Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

DAVID AARON TENENBAUM,

Petitioner,

v.

LOUIS CALDERA,
Secretary of the Department of the Army,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether this Court should grant David Aaron Tenenbaum's ("Tenenbaum's") petition for a writ of certiorari on the grounds that the United States Court of Appeals for the Sixth Circuit refused to follow and/or misinterpreted Supreme Court precedent under *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977); and *Delaware State College v. Ricks*, 449 U.S. 250 (1980), in holding that Tenenbaum did not timely file his religious discrimination claim with the EEOC pursuant to the continuing violations doctrine?

II. Whether this Court should grant Tenenbaum's petition for a writ of certiorari on the grounds that the United States Court of Appeals for the Sixth Circuit refused to follow and/or misinterpreted Supreme Court precedent under *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) and *Bazemore v. Friday*, 478 U.S. 385 (1986), in holding that Tenenbaum did not timely file his religious discrimination claim with the EEOC pursuant to the doctrine of equitable tolling?

III. Whether this Court should grant Tenenbaum's petition for a writ of certiorari on the grounds that the United States Court of Appeals for the Sixth Circuit's decision regarding the justiciability of executive decisions with respect to security clearances directly conflicts with Supreme Court precedent, the equal protection clause of the Fifth Amendment to the Constitution and the laws of the United States?

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December 11, 2002 Order (unreported) of the United States Court of Appeals for the Sixth Circuit denying Tenenbaum's Petition for Rehearing *En Banc* or, Alternatively, Petition for Rehearing ..... Appendix E

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Sixth Circuit denied Tenenbaum's Petition for Rehearing *En Banc* or, Alternatively, Petition for Rehearing on December 11, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS AT ISSUE IN THIS CASE

The Fifth Amendment to the United States Constitution; 42 U.S.C. § 2000e-16(a),(e); 29 C.F.R. § 1614.105(a); 42 U.S.C. § 2000e-2(m); 5 U.S.C. § 7201(b); Executive Orders 12333 §§ 2.1, 2.8; Executive Order 12958 § 1.8(a); Executive Order 12968 § 3.1(c); 5 C.F.R. § 2635.101(b)(13); 32 C.F.R. § 40.2; 5 C.F.R. § 3601.101; AR 60-21, § 1-17 (App. F).

STATEMENT OF THE CASE

Statement of Material Facts and Proceedings

Petitioner, Tenenbaum, has been employed as a civilian mechanical engineer at Respondent, the Department of the Army's (the "Army's"), Tank Automotive Armaments Command ("TACOM") in Warren, Michigan since 1984.

R. 12, First Am. Compl., para. 10, Joint Appendix filed by the parties in the Sixth Circuit ("JA")[1] at 22. During his employment at TACOM, Tenenbaum achieved the high engineering level of a GS-13 engineer and was delegated the broad responsibilities of "creat[ing], plan[ning], direct[ing], conduct[ing], and coordinat[ing] projects within [TACOM], other Government agencies, industry, academia, and foreign countries encompassing research, development, engineering, design or redesign, test and evaluation." R. 8, Resp. to Mot. to Dismiss ("Response"), Exh. V (GS-13 Job Description) at 2, para. 5, JA at 728. Tenenbaum was also given the authority to accept contractors' work and establish professional contacts in both governmental and private sectors to benefit or create projects at TACOM. *Id.* at 2-3, para. 6, JA at 728-729.

Although Tenenbaum was a highly productive employee whom TACOM had assigned to numerous international programs, including U.S.-Israeli programs, the Army began clandestinely and criminally investigating Tenenbaum in at least 1992 contending that Tenenbaum somehow was an Israeli spy based solely upon the fact that Tenenbaum is Jewish. R. 8, Response, Exhs. A-X, JA at 228-745. Despite the undisputed fact that the FBI maintains exclusive investigative jurisdiction over civilian Army employees, the Army nevertheless persisted in its clandestine and unlawful criminal investigation of Tenenbaum on the sole basis that Tenenbaum is Jewish. *Id.* Even when the FBI consistently found and informed the Army from at least 1992 through the fall of 1996 that Tenenbaum had done nothing wrong, the Army persisted in its clandestine and unlawful investigation of Tenenbaum merely because Tenenbaum is Jewish. *Id.*

After the FBI continued to find that Tenenbaum had done nothing wrong in the fall of 1996, the Army disingenuously submitted Tenenbaum for a security clearance upgrade from

1. The exhibits relied upon by Tenenbaum which are not attached in the Appendix hereto are referenced by page number to the Joint Appendix that was submitted to the Sixth Circuit in connection with the underlying proceedings.

"secret" to "top secret" even though the Army was clandestinely accusing Tenenbaum of being a spy, and even though Tenenbaum was only assigned to work on unclassified programs which did not require a security clearance, let alone a "top secret" security clearance, since at least the fall of 1995. *Id.*; R. 8, Response, Exh. P (Deposition of Paul Barnard), Vol. II at 62, JA at 700; R. 8, Response, Exh. K (Deposition of James Gugino), Vol. II at 40-41, JA at 516.

The Army then used the background investigation that is employed through the Department of Defense in granting security clearances as a disguise for conducting another clandestine criminal investigation of Tenenbaum. R. 8, Response, Exhs. A-X, JA at 228-745. While Tenenbaum remained unaware of the investigations that had been clandestinely conducted against him since at least 1992, the Army and the Department of Defense used this pretextual security clearance investigation to interview Tenenbaum on February 3, 1997 and coerce Tenenbaum into submitting to a polygraph examination on February 13, 1997. *Id.* This polygraph examination was conducted in a closed and unmonitored room wherein the examiner was left alone with Tenenbaum for around six hours during which time the polygraph examiner belligerently and repeatedly shouted anti-Semitic remarks at Tenenbaum in a failed attempt to coerce a false confession from Tenenbaum as to being an Israeli spy. *Id.*

Following this Inquisition-*esque* interrogation, the examiner falsely stated that Tenenbaum had confessed to being a spy even though Tenenbaum did not do so. R. 8, Response, Exh. W (February 18, 1997 FBI Teletype), JA at 732-742. As a result of this bogus contention, the FBI opened a criminal investigation into Tenenbaum on February 14, 1997 which began by raiding the Tenenbaum family's home while they were celebrating the Sabbath on February 15, 1997. *Id.*; R. 4, Mot. to Dismiss, Exh. A (Compl. and Demand for Jury Trial), JA at 70-71; R. 8, Response, Exh. K (Deposition of James Gugino), Vol. II at 152-156, 158-159, JA at 544-545. As part of this investigation, Tenenbaum was placed on administrative leave and his security

clearance was suspended pending the outcome of the FBI's criminal investigation. *Id.*; R. 4, Mot. to Dismiss, Exh. C (E-mail from TACOM's Chief of Intelligence and Counter-intelligence), JA at 123.

After approximately 14 months of investigation, the FBI again concluded that Tenenbaum had done nothing wrong and the Department of Justice authored a rare letter on February 3, 1998 admitting that the FBI's investigation was so thorough that "[t]here is no question that if evidence existed which would prove this case, then these agents would have found it." R. 8, Response, Exh. X (Department of Justice Letter), JA at 745.

In March of 1998, Tenenbaum was ordered back to work under the same engineering level and job description that he held prior to being placed on leave; however, Tenenbaum's working conditions and job assignments have not been commensurate with his GS-13 engineering level and job description from March 1998 through the present. R. 12, First Am. Compl., paras. 44-47, 58-59, 65-66, JA at 29-30, 33-34; R. 8, Response, Exhs. A-X, JA at 228-745.

Around the time that Tenenbaum was ordered back to work, Tenenbaum's former attorney provided the Army with the required notice of Tenenbaum's intent to sue under the Federal Tort Claims Act[2]. When the six-month notice period of the Federal Tort Claims Act expired, Tenenbaum's former attorney filed suit in the District Court in October 1998 for, among other claims, violations of the Federal Tort Claims Act and religious discrimination in violation of Michigan's civil rights statute based solely upon the only events of which Tenenbaum was aware at that time: (1) Tenenbaum's February 3, 1997 interview wherein he was coerced into submitting to the polygraph examination; (2) Tenenbaum's February 13, 1997 polygraph examination; and (3) Tenenbaum's family's home being raided on the Sabbath, February 15, 1997, while being placed on

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2. The Federal Tort Claims Act requires that at least six month's notice be provided to a federal agency prior to bringing any claims against that agency under the Federal Tort Claims Act. *See* 28 U.S.C. § 2675.

administrative leave. R. 4, Mot. to Dismiss, Exh. A (Compl. and Demand for Jury Trial), JA at 57-85.

On April 29, 1999, the District Court dismissed Tenenbaum's religious discrimination claims pursuant to the Army Defendants' Motion to Dismiss because Tenenbaum's former attorney erroneously filed suit under Michigan's civil rights statute instead of Title VII of the Civil Rights Act of 1964 ("Title VII"). R. 4, Mot. to Dismiss, Exh. B (Opinion and Order Granting in Part, and Denying in Part, Defendants' Mot. to Dismiss) at 7-10 (App. D, 51a-54a). The District Court further ruled that discovery could commence with respect to the remainder of Tenenbaum's claims which had not been dismissed. *Id.* at 7-20 (App. D, 51a-66a).

Following the District Court's ruling, Tenenbaum initiated contact with the EEOC on June 3, 1999. R. 4, Mot. to Dismiss, Exh. C (EEOC Report), JA at 106. After exhausting his administrative remedies with the EEOC, Tenenbaum properly filed suit under Title VII on January 19, 2000. R. 12, First Am. Compl, JA at 21-35.

Inasmuch as discovery had commenced in his initial lawsuit following the District Court's April 29, 1999 ruling, Tenenbaum began to discover that the Army had been clandestinely and unlawfully investigating him since at least 1992, and that his 1996 "routine" background investigation for a "top secret" security clearance -- which he did not even need inasmuch as he did not even require a security clearance -- was merely a pretextual Army criminal counterintelligence investigation into him merely because he is Jewish. *Id.*

On October 19, 2000, the District Court summarily dismissed Tenenbaum's Title VII claims pursuant to Fed. R. Civ. P. 12(b)(1) on the grounds that it purportedly lacked subject matter jurisdiction because: (1) Tenenbaum purportedly had not filed his EEOC complaint in a timely manner pursuant to 29 C.F.R. § 1614.105 which requires that federal employees file a claim of discrimination within 45 days from the occurrence of the alleged discrimination; and (2) Tenenbaum's allegations

which relate to Tenenbaum's security clearance purportedly are not justiciable. R. 17, October 18, 2000 Hearing Tr. (App. C).

Although the District Court acknowledged the continuing violations exception to statutes of limitation in civil rights cases, it erroneously reviewed the timeliness of Tenenbaum's contact with the EEOC under Rule 12(b)(1) instead of the applicable standard of review under Rule 56. October 19, 2000 Order (unreported) granting Mot. to Dismiss (App. B); *Boddy v. Dean*, 821 F.2d 346, 350 (6th Cir. 1987) (statutes of limitation are not jurisdictional such that motions to dismiss a claim must be brought under Rule 12(b)(6); *Fugarino v. Hartford Life and Accident Ins. Co.*, 969 F.2d 178, 182 (6th Cir. 1992) (when matters are considered outside of the pleadings in adjudicating a motion to dismiss under Rule 12(b)(6), the standard of review is the Rule 56 standard of review for summary judgment). The District Court then made an improper factual determination that under the serial violations aspect of the continuing violations doctrine, Tenenbaum's allegations represented, at most, mere effects of past discrimination despite the fact that Tenenbaum continues to be treated differently than other GS-13 engineers merely because he is Jewish. R. 17, October 18, 2000 Hearing Tr. at 28-30 (App. C, 37a-39a). The District Court did not consider the pattern-or-practice aspect of the continuing violations doctrine. *Id.* at 27 (App. C, 36a). The District Court further held that principles of equitable tolling did not apply based upon the improper factual determination that Tenenbaum was not actively misled by the Army. *Id.* at 31 (App. C, 39a).

Tenenbaum subsequently appealed and, under the proper standard of Rule 56, argued that genuine issues of material fact exist as to whether Tenenbaum timely filed his EEOC complaint pursuant to the continuing violations doctrine and the doctrine of equitable tolling. Tenenbaum further appealed on the grounds that those of his allegations relating to his security clearance are justiciable where an agency fails to follow its own regulations or violates a claimant's constitutional rights.

During the course of the appeal, the Sixth Circuit requested that the parties submit supplemental appellate briefs based upon

this Court's newly issued opinion in *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 (2002) ("*NRPC*") regarding the application of the continuing violations doctrine in Title VII cases.

On August 29, 2002, the Sixth Circuit panel assigned to Tenenbaum's appeal issued an opinion affirming the decision of the District Court. *Tenenbaum v. Caldera*, 45 Fed. Appx. 416 (2002). The panel first held that allegations relating to security clearances are justiciable where an agency violates a claimant's constitutional rights, but erroneously held that such rights do not include claims under Title VII even though Title VII embodies numerous constitutional rights such as the right to be free from religious discrimination. *Id.* at 418.

With respect to the serial violations aspect of the continuing violations doctrine, the Sixth Circuit erroneously upheld the District Court's improper factual determination that the acts of discrimination against Tenenbaum were merely effects of past discrimination in direct violation of Supreme Court precedent establishing the boundaries between present acts of discrimination and mere effects of past discrimination as set forth in *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977) and *Delaware State College v. Ricks*, 449 U.S. 250 (1980). *Id.* at 419-420.

The Sixth Circuit further held that Tenenbaum did not timely initiate contact with the EEOC pursuant to the pattern-or-practice aspect of the continuing violations doctrine on the grounds that a Department of Defense Newsletter to all defense contractors stating that American Jews are counterintelligence risks because of their religion is insufficient standing alone to demonstrate a genuine issue of material fact as to the existence of a pattern-or-practice of religious discrimination. *Id.* at 420.

Finally, the Sixth Circuit held that the doctrine of equitable tolling is not applicable because Tenenbaum knew of three acts of discrimination at the time that he was placed on administrative leave -- his February 3, 1997 interview, his February 13, 1997 polygraph examination and his home being raided on the Sabbath on February 15, 1997 while being placed on

administrative leave -- even though Tenenbaum did not know nor could have known about the discriminatory acts against him which precipitated these three events inasmuch as such acts clandestinely took place since at least 1992 while discovery in Tenenbaum's original suit undisputedly did not commence until after the limitations period began to run in this case. *Id.* at 421.

Tenenbaum timely filed his Petition for Rehearing *En Banc* or, Alternatively, Petition for Rehearing on October 15, 2002 which the Sixth Circuit denied on December 11, 2002. Order denying Petition for Rehearing *En Banc* or, Alternatively, Petition for Rehearing (App. E).

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit Directly Violated Supreme Court Precedent In Holding That Tenenbaum Did Not Timely File His Religious Discrimination Claim With The EEOC Pursuant To The Continuing Violations Doctrine.

A. The Sixth Circuit Violated Supreme Court Precedent of NRPC With Respect to the Serial Violations Aspect of the Continuing Violations Doctrine.

In *NRPC*, this Court addressed the serial violations aspect of the continuing violations doctrine and definitively held that all discrete acts of discrimination that occur within the applicable limitations period are actionable. *NRPC*, 536 U.S. at 120. In determining when a discrete act of discrimination has occurred, this Court clearly held that "[a] discrete retaliatory or discriminatory act 'occurred' on the day that it 'happened.'" *Id.* In addition, this Court held that similar and/or related acts of discrimination predating the limitations period are not actionable; however, such acts can be used as relevant background evidence, and an employee's knowledge of such acts does not bar the employee from filing timely charges regarding related discrete acts of discrimination. *Id.* To provide an example of what constitutes a discrete, present act of discrimination, this Court cited to *Bazemore v. Friday*, 478 U.S. 385 (1986) (*per curiam*), wherein a discrete, present act of

discrimination was held to occur each time that a paycheck delivered less to a black person than to a similarly situated white person. *See NRPC*, 536 U.S. at 121.

Notwithstanding this Court's definitive explanation of what constitutes an actionable discrete, present act of discrimination in *NRPC*, the Sixth Circuit simply affirmed the District Court's determination that each discrete act of discrimination committed by the Army within the limitations period was merely the effect of past discrimination in complete contradiction of *NRPC*. *Tenenbaum*, 45 Fed. Appx. at 418. Indeed, pursuant to the binding precedent established in *NRPC*, the Sixth Circuit was required to reverse the District Court's erroneous ruling inasmuch as Tenenbaum clearly pled that related discrete acts of discrimination occurred against him throughout the limitations period and through the present, and more than sufficient evidence exists to establish genuine issues of material fact with respect thereto. R. 12, First Am. Compl., paras. 44-47, 58-59, 65-66, JA at 29-30, 33-34.

Although Tenenbaum holds the extremely high civilian employment rank of a GS-13 engineer, he has been treated less favorably than the other GS-13 engineers throughout the limitations period and through the present as a result of his religion even though it is undisputed that Tenenbaum is qualified to conduct his job duties. *Id.* Specifically, Tenenbaum, unlike the other GS-13 engineers, is no longer allowed to continue doing any of the work which served as the basis of his career, nor is he allowed to work on any other projects of any significance. *Id.* In fact, Tenenbaum's former supervisor testified that the Army has deliberately isolated Tenenbaum by physically separating him from his former employment group. R. 8, Response, Exh. T (Deposition of James Thompson) at 53-56, JA at 725. Moreover, TACOM's Chief of Counterintelligence even admitted that Tenenbaum continues to be viewed suspiciously by members of the Army. R. 8, Response, Exh. P (Deposition of Paul Barnard), Vol. II at 103-107, JA at 710-711. Tellingly, the EEO Report issued in Tenenbaum's case

specifically states in Part IV, Section a, that Tenenbaum alleged that:

> there have been complaints from [Tenenbaum's] co-workers that noticed [Tenenbaum] was not doing any work. [Tenenbaum] also alleged that his inability to perform the task that his co-workers noticed he wasn't performing is due to his being labeled a spy and subject to continual harassment including the revocation of his security clearance. [Tenenbaum] also alleged that he has been denied opportunities for advancement because his character has been defamed internationally as a result of these actions. R. 4, Mot. to Dismiss, Exh. C (EEOC Report) at § IV(a), JA at 106.

In addition, the Army committed yet another discrete act of discrimination on November 10, 1999 when it requested that Tenenbaum's security clearance be revoked based solely upon the same allegations that the Army used as a pretext for the FBI's criminal investigation, and for which the Department of Justice admitted on February 3, 1998 that the FBI's investigation was so thorough that "[t]here is no question that if evidence existed which would prove this case, then these agents would have found it." R. 12, First Am. Compl., paras. 45-47, JA at 29-30; R. 8, Response, Exh. P (Deposition of Paul Barnard), Vol. II at 100-103, JA at 709-710; R. 8, Response, Exh. X (Department of Justice Letter), JA at 745. Indeed, TACOM's Chief of Counterintelligence admitted that this is the only case at TACOM in which an employee's ethnic and religious background have been used to support espionage allegations and a decision to revoke the employee's security clearance. R. 8, Response, Exh. P (Deposition of Paul Barnard) Vol. II at 102-103, JA at 710. Even though the FBI's investigation proved Tenenbaum to be completely innocent, no efforts whatsoever have been made by the Army to inform its security clearance division that the Army's reasons for revoking Tenenbaum's security clearance have all been completely disproved. *Id.* at 98-100, JA at 709.

All of the aforementioned acts clearly constitute discrete acts of discrimination against Tenenbaum throughout the limitations period and through the present inasmuch as such acts happened within the limitations period, and Tenenbaum's disparate treatment compared to the other GS-13 engineers happened each and every day of the limitations period and has continued to happen each and every day through the present. Indeed, this Court made clear in *NRPC* that identifiable acts of discrimination can occur within a cycle of disparate treatment such as the acts of religious discrimination experienced by Tenenbaum as a result of his disparate treatment at work. *See NRPC*, 536 U.S. at 121, *citing*, *Bazemore*, 478 U.S. 385 (*per curiam*) (a discrete act of discrimination occurred each time that a paycheck delivered less to a black person than to a similarly situated white person). Similar to this Court's holding in *Bazemore*, a discrete act of discrimination has occurred against Tenenbaum each and every day of the limitations period through the present inasmuch as Tenenbaum has been and continues to be treated differently at work than the other GS-13 engineers on the sole basis of his religion. As this Court made clear in *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 at n.15 (1977), disparate treatment "is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, religion, sex, or national origin. . . . Undoubtedly, disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII." (Citations omitted).

The Sixth Circuit, however, ignored Supreme Court precedent and held that Tenenbaum's allegations of discrimination such as

> discriminatory job assignments and work responsibilities, including precluding his access to classified information, limiting his contact with Israelis, physically isolating him from his former co-workers, and preventing him from participating in the projects on which his career was based[,]

are merely effects of past discrimination because such acts purportedly relate to Tenenbaum's security clearance which

somehow remained suspended following the FBI's investigation even though: (1) almost all of the discrete acts of discrimination recognized by the Sixth Circuit have had nothing whatsoever to do with whether or not Tenenbaum holds a security clearance; and (2) Supreme Court precedent under *Delaware State College v. Ricks* and *United Air Lines, Inc. v. Evans*, make clear that the acts of discrimination referred to by the Sixth Circuit are not mere effects of past discrimination. *Tenenbaum*, 45 Fed. Appx. at 419-420.

With the exception of "precluding his access to classified information," which has hampered Tenenbaum's chances for career advancement, Tenenbaum did not require his security clearance for any of the Sixth Circuit's cited adverse employment conditions. R. 8, Response, Exh. U (Letter from Richard McClelland), JA at 726; R. 8, Response, Exh. P (Deposition of Paul Barnard), Vol. II at 62, JA at 700; R. 8, Response, Exh. K (Deposition of James Gugino), Vol. II at 40-41, JA at 516. In fact, the FBI field agent in charge of the Tenenbaum investigation testified that, in 1996 -- the year leading up to the FBI's criminal investigation -- Tenenbaum was exclusively working on unclassified programs for which he did not require a security clearance. R. 8, Response, Exh. K (Deposition of James Gugino), Vol. II at 40-41, JA at 516. TACOM's Chief of Counterintelligence further testified that Tenenbaum had not accessed classified information since at least the fall of 1995. R. 8, Response, Exh. P (Deposition of Paul Barnard), Vol. II at 62, JA at 700. Tellingly, TACOM's job description for GS-13 engineers like Tenenbaum does not even list a security clearance as an employment requirement. R. 8, Response, Exh. V (GS-13 Job Description), JA at 727-731. Therefore, the acts of discrimination referred to by the Sixth Circuit as "discriminatory job assignments and work responsibilities, limiting his contact with Israelis, physically isolating him from his former co-workers, and preventing him from participating in the projects on which his career was based," as well as the other acts of discrimination described above, are absolutely actionable inasmuch as such acts did not require that Tenenbaum possess

a security clearance. R. 8, Response, Exh. K (Deposition of James Gugino), Vol. II at 40-41, JA at 516; R. 8, Response, Exh. P (Deposition of Paul Barnard),Vol. II at 62, JA at 700; Response, Exh. V (GS-13 Job Description), JA at 727-731.

Such discrete acts of discrimination do not constitute mere effects of past discrimination pursuant to Supreme Court precedent under *NRPC*; *Bazemore*; and *International Bhd. of Teamsters* as discussed above, as well as Supreme Court precedent under *Delaware State College v. Ricks* and *United Air Lines, Inc. v. Evans* regarding discrete acts versus mere effects of invidious discrimination.

In *Delaware State College v. Ricks*, a professor, Ricks, was denied tenure and offered a one-year contract with notice that his employment would end at the completion of that contract. *See Delaware State College*, 449 U.S. at 252-258. Following the completion of his contract, Ricks sued the college under Title VII which was held to be untimely inasmuch as Ricks was not treated differently than other applicants who were denied tenure such that any discrimination against Ricks would have occurred on the date his tenure was denied and rendered any activity thereafter a mere effect of past discrimination. *Id.* at 258.

In *United Air Lines, Inc. v. Evans*, a stewardess, Evans, was forced to leave her employment with United Airlines due to a gender-based policy of discrimination. *See United Air Lines, Inc.*, 431 U.S. 553. Evans returned to work when the policy failed to withstand Title VII scrutiny and filed suit because, upon being rehired by the company, she was not returned to the level of seniority at which she had been forced to terminate her employment. *Id.* The Court then held that Evans' complaint was untimely inasmuch as the seniority system was a neutral and neutrally-applied system such that the plaintiff's loss of seniority was a mere effect of past discrimination. *Id.*

Unlike Ricks, Tenenbaum's employment has not been terminated nor has Tenenbaum been treated the same as other GS-13 engineers in any event. Unlike Evans, Tenenbaum was not terminated from his employment and subsequently rehired under a neutral and neutrally-applied employment system.

To the contrary, Tenenbaum was ordered back to work in his capacity as a GS-13 engineer after the FBI's investigation exonerated him, yet he continues to be treated differently than the other GS-13 engineers on the sole basis of his religion. Such disparate treatment, assignments and responsibilities at work clearly constitute present and discrete acts of discrimination. Indeed, Supreme Court precedent under *NRPC* makes clear that the emphasis in deciding the issue of acts versus effects of discrimination "'should not be placed on mere continuity' but on 'whether any present *violation* existed.'" *NRPC*, 536 U.S. at 121, *quoting*, *United Air Lines, Inc.*, 431 U.S. at 558.

In addition, when the FBI launched its investigation into Tenenbaum, Tenenbaum's security clearance was suspended "pending the completion of the ongoing investigation" by the plain and clear terms of the suspension. R. 4, Mot. to Dismiss, Exh. C (E-mail from TACOM's Chief of Intelligence and Counterintelligence), JA at 123. Inasmuch as the outcome of the FBI's investigation was that Tenenbaum was exonerated and Department of Justice admitted on February 3, 1998 that the FBI's investigation was so thorough that "[t]here is no question that if evidence existed which would prove this case, then these agents would have found it," the suspension of Tenenbaum's security clearance ended at that time. *Id.*; R. 8, Response, Exh. X (Department of Justice Letter), JA at 745. In any event, the status of Tenenbaum's security clearance is immaterial to the timeliness of Tenenbaum's contact with the EEOC inasmuch as almost all of the discrete acts of discrimination committed against Tenenbaum have absolutely nothing whatsoever to do with Tenenbaum's security clearance. In fact, the Sixth Circuit even erroneously and improperly made factual determinations that all discrete acts of discrimination against Tenenbaum are somehow based upon Tenenbaum's suspended security clearance. *See Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (in ruling upon a motion for summary judgment, the courts must view the evidence and draw all reasonable inferences in favor of the non-moving party). This Court has firmly established that, in ruling upon a motion for

summary judgment, the courts may not make factual determinations such as weighing the evidence and resolving factual disputes. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). *See also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-159 (1970). Not only does the Sixth Circuit's improper factual determination conflict with Supreme Court precedent in adjudicating motions for summary judgment, but it is also contrary to the evidence in this case which, at the very least, establishes genuine issues of material fact as to whether Tenenbaum timely initiated contact with the EEOC pursuant to the serial violations aspect of the continuing violations doctrine.

B. The Sixth Circuit Violated Supreme Court Precedent With Respect to the Pattern-or-Practice Aspect of the Continuing Violations Doctrine and/or Hostile Work Environment.

Although, this Court did not have occasion to address the pattern-or-practice aspect of the continuing violations doctrine in *NRPC*, this Court addressed this aspect of the continuing violations doctrine in *Bazemore* holding that a pattern-or-practice of discrimination occurred where a state agency engaged in and perpetuated a policy of discrimination against black employees by paying black employees less than similarly-situated white employees. *See NRPC*, 536 U.S. at 123 n.9; *Bazemore*, 478 U.S. at 395-396. This Court further held that the state agency was liable for all such acts of discrimination in underpaying its black employees from the time that Title VII became applicable to public employers in 1972 forward. *Id.* In addition to *Bazemore*, this Court noted in *International Bhd. of Teamsters* that a pattern-or-practice of discrimination is essentially composed of an invidiously discriminatory policy/pattern/practice that is implemented in an industry or institution, or by individuals within an industry or institution. *See International Bhd. of Teamsters*, 431 U.S. at 336-376.

Based upon *Bazemore* and *International Bhd. of Teamsters*, two legal standards appear to govern pattern-or-practice cases of discrimination pursuant to the second category of the continuing violations doctrine. First, a pattern-or-practice of

discrimination occurs where an industry or institution, or individuals within an industry or institution, behave in an invidiously discriminatory manner pursuant to a policy/pattern/practice of discrimination which is based upon repeated discriminatory conduct. *Id.*; *Bazemore*, 478 U.S. at 395-396. Second, as long as at least one discriminatory act occurred within the limitations period, all acts of discrimination within a pattern-or-practice of discrimination are actionable, even those falling outside the applicable limitations period, inasmuch as such discriminatory acts are repeatedly made in furtherance of an unlawful policy/pattern/practice of discrimination. *See Bazemore*, 478 U.S. at 395-396.

These legal standards are virtually identical to the legal standards in adjudicating hostile work environment claims under Title VII. In *NRPC*, this Court confirmed that "[h]ostile work environment claims are different in kind from discrete acts. Their very nature involves repeated conduct." *NRPC*, 536 U.S. at 123 (citations omitted). "A hostile work environment claim is comprised of a series of separate acts that collectively constitute one 'unlawful employment practice.'" *Id.* at 124 (citations omitted). "The 'unlawful employment practice' therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own." *Id.*, *citing*, *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (other citations omitted). "Given, therefore, that the incidents comprising a hostile work environment are part of one unlawful employment practice, the employer may be liable for all acts that are part of this single claim" as long as at least one discriminatory act occurred within the limitations period. *Id.* at 125, 128.

In addition to these similar legal standards, the criteria for assessing hostile work environment claims under Title VII are also instructive in assessing claims under the pattern-or-practice aspect of the continuing violations doctrine. Such criteria include an evaluation of "'all the circumstances,' including 'the frequency of the discriminatory conduct; its severity; whether

it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" *Id.* at 124, *quoting*, *Harris*, 510 U.S. at 23.

Based upon the foregoing precedent, the Sixth Circuit should have reversed the District Court's ruling on the basis of the pattern-or-practice aspect of the continuing violations doctrine and/or hostile work environment inasmuch as Tenenbaum pled facts alleging a pattern-or-practice of discrimination and/or hostile work environment, and more than sufficient evidence establishes the existence of genuine issues of material fact.

For instance, a Department of Defense Newsletter was issued which clearly labeled American Jews as counter-intelligence risks simply because they are Jewish. R. 8, Response, Exh. F (Deposition of Robert Riley), Vol. II at 238-241, JA at 377-378. It was pursuant to this Newsletter that the Army continued discriminating against Tenenbaum following the FBI's findings from at least 1992 through 1994 that Tenenbaum had done nothing wrong. *Id.*; R. 8, Response (Exh. A (Deposition of Steve Twynham), Vol. I, JA at 228-289.

In fact, during discovery in Tenenbaum's initial lawsuit, TACOM's Chief of Intelligence and Counterintelligence attested that Tenenbaum's being Jewish fit a "classic profile" for espionage-related activity. R. 8, Response, Exh. D (Sworn Statement of TACOM's Chief of Intelligence and Counter-intelligence), JA at 298. One of the Army counterintelligence officers who had interviewed Tenenbaum following the release of the Department of Defense Newsletter further testified that Tenenbaum's being Jewish fit this "classic profile" for espionage-related activity. R. 8, Response, Exh. A (Deposition of Steve Twynham), Vol I at 127-129, JA at 260-261. In addition, this same Army counterintelligence officer, as well as TACOM's Chief of Counterintelligence and one of the Department of Defense officers who interviewed Tenenbaum on February 3, 1997 and coerced Tenenbaum into submitting to the Inquisition-*esque* polygraph examination, testified that: (a) it was significant

that Tenenbaum was a Jew dealing with the Jewish state of Israel; (b) Tenenbaum's being Jewish was a driving factor in accusing him of espionage; (c) Army personnel were making accusations against Tenenbaum because of Tenenbaum's ethnic heritage, religious beliefs and affinity towards Israel; and (d) Tenenbaum's religious background was viewed as a security risk. *Id.*; R. 8, Response, Exh. P (Deposition of Paul Barnard), Vol. I at 78-80, JA at 654; R. 8, Response, Exh. F (Deposition of Robert Riley), Vol. I at 146-148, JA at 339.

Furthermore, the polygraph examiner reprehensibly told Tenenbaum that he had "done other Jews before" and forced them all to confess, and that he would get Tenenbaum to confess to spying for Israel. R. 4, Mot. to Dismiss, Exh. A (Compl. and Demand for Jury Trial), para. 38, JA at 65-66. Curiously, the polygraph examiner informed the FBI that Tenenbaum's religious beliefs/heritage were Tenenbaum's number one priority in life and that Tenenbaum would have divulged information to the Israelis based on his devout religious beliefs. R. 8, Response, Exh. W (February 18, 1997 FBI Teletype) at 5-6, JA at 736-737. The polygraph examiner, however, tellingly omitted all references to Tenenbaum's religious heritage when he produced his official report of the polygraph examination. R. 8, Response, Exh. I (Deposition of Mark Yourchock) at 68-71, JA at 429-430.

In addition, the FBI's Detroit office received a handwritten statement claiming that a Jewish person's right to automatic Israeli citizenship is a common practice invoked by American Jews but not U.S. government employees even though Tenenbaum has never been nor attempted to become a citizen of any other country. R. 8, Response, Exh. K (Deposition of James Gugino), Vol. II at 165-169, JA at 547-548. Moreover, the FBI field agent in charge of the Tenenbaum investigations reprehensibly described American Jews as "Israeli nationals" during his deposition. *Id.*

In conjunction with these facts, handwritten notes taken at a meeting between the FBI and Army personnel specifically use the phrase "Anti Jewish Sentiment" to describe the

circumstances surrounding the disproved espionage allegations against Tenenbaum. R. 8, Response, Exh. O (Deposition of Sean Nicol) at 50-53, JA at 620-621. Tenenbaum further learned that despite satisfying all of his work requirements and complying with all rules, regulations, practices and procedures, TACOM employees referred to Tenenbaum as the "Little Jewish Spy." R. 12, First Am. Compl., para. 47, JA at 29-30.

The Commander of TACOM's research, engineering and development branch where Tenenbaum is employed directly testified that none of the above events would have occurred had Tenenbaum not been Jewish. *Id.* at paras. 51, 54, JA at 31-32. In fact, as TACOM's Chief of Counterintelligence testified, Tenenbaum's case is the only case at TACOM in which an employee's ethnic and religious background have been used to support espionage allegations and a decision to revoke the employee's security clearance. R. 8, Response, Exh. P (Deposition of Paul Barnard), Vol. II at 102-103, JA at 710.

In view of this substantial evidence, the Sixth Circuit erroneously and improperly made the factual determination that the Department of Defense Newsletter standing alone did not create a genuine issue of material fact as to the existence of a pattern-or-practice of discrimination pursuant to the pattern-or-practice aspect of the continuing violations doctrine and/or hostile work environment. *See Matsushita Elec. Indus.*, 475 U.S. at 587 (in ruling upon a motion for summary judgment, the courts must view the evidence and draw all reasonable inferences in favor of the non-moving party); *Anderson*, 477 U.S. 242 (in ruling upon a motion for summary judgment, the courts may not make factual determinations such as weighing the evidence and resolving factual disputes); *Adickes*, 398 U.S. at 158-159 (same). Indeed, the totality of the foregoing substantial evidence clearly demonstrates that, at the very least, genuine issues of material fact exist as to whether Tenenbaum has been and continues to be discriminated against pursuant to a policy/pattern/practice of discrimination and subjected to a hostile work environment thereunder.

II. The Sixth Circuit Directly Violated Supreme Court Precedent In Refusing To Apply The Doctrine Of Equitable Tolling.

The Sixth Circuit refused to apply the doctrine of equitable tolling to this case on the grounds that Tenenbaum's previous attorney mistakenly filed suit in October 1998 under Michigan's civil rights statute instead of filing a complaint with the EEOC. *Tenenbaum*, 45 Fed. Appx. at 421. The panel's decision, however, sharply conflicts with Supreme Court precedent regarding equitable tolling.

Under Supreme Court precedent, equitable tolling has been applied "in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990) (citations omitted). *See also NRPC*, 536 U.S. at 122 (the doctrine of equitable tolling applies to cases brought under Title VII), *citing*, *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). Both of the situations described in *Irwin* are present in this case.

Tenenbaum's initial lawsuit, which was filed in October 1998, was defective with respect to Tenenbaum's religious discrimination claims inasmuch as such claims were improperly brought by Tenenbaum's former attorney under Michigan's civil rights statute. These claims, however, were timely filed during the statutory period proscribed by 29 C.F.R. § 1614.105 and Tenenbaum diligently pursued his religious discrimination claims such that his claim was timely filed pursuant to the criteria set forth in *Irwin*. *See Irwin*, 498 U.S. at 96 (equitable tolling is applied where a claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period), *citing Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 434-435 (1965) (providing for the equitable tolling of the statute of limitations proscribed by the Federal Employers' Liability Act where a timely action was commenced but in an

improper venue during which time the limitations period expired), *Herb v. Pitcairn*, 325 U.S. 77, 78 (1945) (same).

Specifically, Tenenbaum's initial lawsuit included several claims which were brought pursuant to the Federal Tort Claims Act. R. 4, Mot. to Dismiss, Exh. A (Compl. and Demand for Jury Trial), JA at 57-85. Therefore, Tenenbaum was required to provide the Army with at least six months notice of his claims (*see* 28 U.S.C. § 2675) which he undisputedly did around the time that he was ordered back to TACOM in March 1998, including his religious discrimination claims for the acts of discrimination that he personally experienced and was therefore aware of in 1997 -- his February 3, 1997 interview wherein he was coerced into submitting to the February 13, 1997 polygraph examination and his family's home being raided on the Sabbath, February 15, 1997, while being placed on administrative leave. *Id.* Thus, at the time that Tenenbaum filed his initial lawsuit in October 1998, the Army had been placed on notice of Tenenbaum's religious discrimination claims for well over six months and well within the 45 days proscribed by 29 C.F.R. § 1614.105 inasmuch as Tenenbaum continued to be placed on administrative leave and subject to the FBI's criminal investigation during that 45-day period. Indeed, Tenenbaum had only been exonerated through the Department of Justice letter on February 3, 1998 which was well within 45 days of being ordered back to work following the outcome of the FBI's criminal investigation. R. 8, Response, Exh. X (Department of Justice Letter), JA at 745. Therefore, Tenenbaum diligently pursued his religious discrimination claims and timely filed such claims even though they were improperly brought by Tenenbaum's former attorney pursuant to Michigan's civil rights statute.

Tenenbaum's case also fits the second situation set forth in *Irwin* inasmuch as Tenenbaum was "induced or tricked by [the Army's] misconduct into allowing the filing deadline to pass." *Irwin*, 498 U.S. at 96 (citations omitted). *See also Holmberg v. Armbrecht*, 327 U.S. 392, 397-398 (1946) (equitable tolling applied where one party causes an opposing party to miss the

applicable filing deadline by concealing and/or misrepresenting material facts to the opposing party such that the opposing party is unaware of the applicable filing deadline and/or the need to file a complaint).

In this case, Tenenbaum was actively misled by the Army since at least 1992 inasmuch as the Army was clandestinely and unlawfully conducting criminal counterintelligence investigations into Tenenbaum since that time. R. 8, Response, Exhs. A-X, JA at 228-745. Indeed, at the time that Tenenbaum's previous attorney mistakenly filed suit in October 1998 under Michigan's civil rights statute instead of filing a complaint with the EEOC, Tenenbaum only knew about the aforementioned three events of discrimination, and only because he was directly confronted with such events. *Id.*; R. 4, Mot. to Dismiss, Exh. A (Compl. and Demand for Jury Trial), JA at 57-85. Tenenbaum did not and could not have known about any of the Army's other discriminatory actions against him from at least 1992 forward inasmuch as the Army fraudulently concealed its unlawful conduct from Tenenbaum which precluded Tenenbaum from being able to file suit at the time that such events occurred. *Id.*

In *NRPC*, this Court noted that obvious acts precluding equitable tolling include acts of "termination, failure to promote, denial of transfer or refusal to hire." *See NRPC*, 536 U.S. at 123. None of these acts applies here inasmuch as the Army's conduct consisted of deliberately concealing information of unlawful and anti-Semitic discrimination against Tenenbaum since at least 1992, and Tenenbaum undisputedly did not and could not have known about such facts until discovery commenced in his initial lawsuit. Indeed, it is undisputed that the limitations period did not commence in Tenenbaum's initial lawsuit until April 29, 1999 when the District Court dismissed Tenenbaum's religious discrimination claims which Tenenbaum's previous attorney improperly filed under Michigan's civil rights statute and permitted discovery to commence with respect to Tenenbaum's remaining claims. R. 4, Mot. to Dismiss, Exh. B (Opinion and Order Granting in

Part, and Denying in Part, Defendants' Mot. to Dismiss) (App. D). Therefore, Tenenbaum did not and could not have known about the discriminatory acts perpetrated against him since at least 1992 at the time of filing his initial Complaint in October 1998. *Id.*

III. The Panel's Decision Regarding The Justiciability Of Executive Decisions Regarding Security Clearances Directly Conflicts With Supreme Court Precedent, The Equal Protection Clause Of The Fifth Amendment To The Constitution And The Laws Of The United States.

With respect to Tenenbaum's allegations of religious discrimination which implicate Tenenbaum's security clearance, the Sixth Circuit held that, while courts have the power to review security clearance issues where constitutional rights are alleged to have been violated, constitutional rights somehow do not include any claims under Title VII. *Tenenbaum*, 45 Fed. Appx. at 418. This holding, however, is fatally flawed on several grounds inasmuch as it directly conflicts with: (1) Supreme Court precedent; (2) all of the governing executive orders, federal statutes and Department of Defense regulations by which the Army is bound; and (3) the equal protection clause of the Fifth Amendment to the Constitution[3].

3. Supreme Court review of the Sixth Circuit's decision is further necessitated by the fact that several other Appellate Circuits have rendered similar opinions which pose the same legal ramifications as does the Sixth Circuit's holding in this case. *See Ryan v. Reno*, 168 F.3d 520, 524 (D.C. Cir. 1999) (Title VII claims involving security clearance issues may not be reviewed, although constitutional claims may be reviewed); *Stehney v. Perry*, 101 F.3d 925, 932 (1996) (claims involving security clearance issues may not be reviewed, although constitutional claims may be reviewed); *Becerra v. Dalton*, 94 F.3d 145, 149 (4th Cir. 1996), *cert. denied*, 519 U.S. 1151 (1997) (Title VII claims involving security clearance issues may not be reviewed); *Perez v. FBI*, 71 F.3d 513, 515 (5th Cir. 1995), *cert. denied*, 517 U.S. 1234 (1996) (Title VII claims involving security clearance issues may not be reviewed); *Brazil v. Department of the Navy*, 66 F.3d 193, 196-197 (9th Cir. 1995), *cert. denied*, 517 U.S. 1103 (1996) (Title VII claims involving security (Cont'd)

In *Webster v. Doe*, 486 U.S. 592, 603 (1988), this Court held that absent clear, express and constitutional congressional intent to preclude judicial review of certain matters, judicial review of executive employment decisions, including decisions regarding security clearances, is appropriate where constitutional rights are alleged to have been violated "to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." Although the Sixth Circuit acknowledged this precedent, it inexplicably held that constitutional rights somehow do not include any claims under Title VII involving security clearance and/or employment decisions in direct contravention of *Webster*, the Fifth Amendment to the Constitution and Title VII. *Tenenbaum*, 45 Fed. Appx. at 418.

It is axiomatic under the equal protection clause of the Fifth Amendment that Americans maintain the constitutional right to be free from invidious discrimination. To this end, Title VII was specifically enacted to provide remedies for invidious discrimination in federal employment. *See International Bhd. of Teamsters*, 431 U.S. at 335, n.15 (disparate treatment "is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, religion, sex, or national origin. . . . Undoubtedly, disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII") (citations omitted). *See also* 110 Cong. Rec. 13088 (1964) (remarks of Sen. Humphrey: Title VII "provides that men and women shall be employed on the basis of their qualifications, not as Catholic citizens, not as Protestant citizens, not as Jewish citizens, not as colored citizens, but as citizens of the United States").

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clearance issues may not be reviewed); *National Fed'n of Fed. Employees v. Greenberg*, 983 F.2d 286, 290 (1993) (claims involving security clearance issues may not be reviewed, although constitutional claims may be reviewed); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (1990), *cert. denied*, 499 U.S. 905 (1991) (claims involving security clearance issues may not be reviewed, although constitutional claims may be reviewed).

Specifically, Section 2000e-16 of Title VII absolutely prohibits religious discrimination in federal employment. *See* 42 U.S.C. § 2000e-16(a), (e) (App. F, 70a-71a). Section 2000e-2(m) of Title VII further provides that:

> Except as otherwise provided in this title [42 U.S.C. §§ 2000e *et seq.*], an *unlawful employment practice is established when* the complaining party demonstrates that race, color, *religion*, sex, or national origin *was a motivating factor for any employment practice, even though other factors also motivated the practice.* (Emphasis added). 42 U.S.C. § 2000e-2(m) (App. F, 72a).

These critical provisions of Title VII allow for the enforcement of the equal protection clause of the Fifth Amendment and the redress of violations thereof for all federal employees who are afflicted by religious discrimination and any other form of invidious discrimination. Therefore, the Sixth Circuit's holding stands in direct contradiction of the Fifth Amendment and Title VII.

In addition, the Sixth Circuit's decision directly conflicts with the express congressional position that, "[i]t is the policy of the United States to insure equal employment opportunities for employees without discrimination because of race, color, religion, sex or national origin." 5 U.S.C. § 7201(b) (App. F, 73a). This federal statute and the aforementioned provisions of Title VII have been further incorporated into Department of Defense regulations which absolutely prohibit religious discrimination. *See* 5 C.F.R. § 2635.101(b)(13) (App. F, 76a); 32 C.F.R. § 40.2 (App. F, 78a); 5 C.F.R. § 3601.101 (App. F, 77a); AR 60-21, § 1-17 (App. F, 85a). Furthermore, the Sixth Circuit's holding is also contrary to Executive Order 12968 which directly governs the behavior of executive agencies such as the Army, and which expressly prohibits religious discrimination against federal employees like Tenenbaum in

granting access to classified information. Executive Order 12968 at § 3.1(c) (App. F, 83a-84a)[4].

Despite the foregoing, the Sixth Circuit's holding has now effectively removed federal employees' constitutional right to be free from invidious discrimination by precluding federal employees from seeking legal recourse under Title VII for invidious discrimination perpetrated against them with respect to their security clearance. As this Court held in *Brown v. General Servs. Admin.*, 425 U.S. 820, 829 (1976), Title VII is the "exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination." Therefore, all federal employees like Tenenbaum who suffer from invidious discrimination must bring all legal action stemming from such discrimination under Title VII. *See Brown*, 425 U.S. at 829. However, according to the Sixth Circuit, such claims are no longer justiciable in the event that such claims involve security clearance issues and/or the executive agency at issue is crafty enough to base its invidious discrimination against an employee upon that employee's security clearance in order to avoid any legal consequences for such invidious discrimination. Indeed, the Sixth Circuit even improperly made the erroneous factual determination that all of present acts of discrimination against Tenenbaum somehow relates to Tenenbaum's security clearance. *See supra* § I(A). Such a result is contrary to every principle of justice and democracy, and this Court specifically upholds the basic tenet of our system of justice that "[t]he very essence of civil liberty certainly consists in the right of every individual to

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4. It should also be noted that Executive Order 12333 expressly forbids intelligence-related activities which are inconsistent with the Constitution, applicable laws and principles upon which the United States was founded. Executive Order 12333 at §§ 2.1, 2.8 (App. F, 79a-80a). In addition, Executive Order 12958 expressly provides that "[i]n no case shall information be classified in order to: (1) conceal violations of law, inefficiency, or administrative error; (2) prevent embarrassment to a person, organization, or agency; . . . or (4) prevent or delay the release of information that does not require protection in the interest of national security." Executive Order 12958 at § 1.8(a) (App. F, 81a-82a).

claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

In effectively removing the constitutional right of each and every American in the federal employment sector to be free from invidious discrimination with respect to security clearance issues, the Sixth Circuit has also created a situation where the equal protection clause of the Fifth Amendment is violated inasmuch as federal employees like Tenenbaum who belong to protected class of federal employees under Title VII (i.e., religion, race, gender, national origin) entitled to strict scrutiny review now receive less protection than federal employees who are only entitled to rational basis review. Specifically, constitutional claims have been held reviewable in security clearance cases where plaintiffs have alleged that their security clearances were revoked on the basis of their homosexuality. *See, e.g., Webster*, 486 U.S. at 603; *Brockman v. Air Force*, 27 F.3d 544, 547 (Fed. Cir. 1994); *High Tech Gays v. Defense Industrial Security Clearance Service*, 895 F.2d 563 (9th Cir. 1990); *Doe v. Cheney*, 885 F.2d 898, 903-908 (D.C. Cir. 1989); *Dubbs v. CIA*, 866 F.2d 1114, 1119 n.8 (9th Cir. 1989); *Doe v. Schachter*, 804 F. Supp. 53, 58 (N.D. Cal. 1992); *Buttino v. FBI*, 801 F. Supp. 298, 312 (N.D. Cal. 1992).

The result of the Sixth Circuit's holding is that, at best, an anomaly has been warped into the most basic tenets of civil liberty and equal protection as federal employees like Tenenbaum who are part of a protected class and are subjected to invidious discrimination as a result of their religion are absolutely precluded from vindicating their legal rights while other federal employees who are not part of a protected class may pursue their claims in court. Take for example the hypothetical case of three female GS-13 engineers hired at TACOM. Engineer #1 has her security clearance revoked because her supervisor who is a Democrat found out that she voted Republican in the last election and the supervisor believes that this makes her a security threat. Engineer #2 has her security clearance revoked because Engineer #2 is a female, and her

male supervisor concocts a story that Engineer #2 somehow is a security threat because he does not like working with females. Engineer #3 has her security clearance revoked because she is a homosexual and her supervisor feels that her homosexuality is a security threat. Based upon the Sixth Circuit's holding, Engineer #1 would be able to sue the Army for violating her constitutional right to vote, and Engineer #3 would be able to sue the Army even though homosexuals are not a protected class of citizens. Engineer #2, however, would not be able to sue the Army even though, like Tenenbaum, she is part of a protected class of citizens and undeniably suffered from invidious discrimination.

This anomalous result readily illustrates the fatal flaws in the Sixth Circuit's holding. Moreover, these flaws are compounded by the fact that such results are directly contradicted by *Webster* and the applicable executive orders, federal statutes and Department of Defense regulations which absolutely prohibit invidious discrimination in the federal employment context, including executive employment decisions and executive security clearance decisions.

In addition, the Sixth Circuit's holding is distressing inasmuch as it effectively precludes judicial review of executive employment decisions and security clearance issues implicating the equal protection clause of the Fifth Amendment even though judicial review is a basic tenet of our judicial system and has been repeatedly applied to controversial executive branch cases which involve matters more closely associated with executive powers than constitutional rights protected by the equal protection clause of the Fifth Amendment. *See, e.g., Webster*, 486 U.S. at 603 (even security clearance and executive employment decisions are justiciable where constitutional claims are involved "to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim"); *Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("[c]onstitutional questions obviously are unsuited to resolution in administrative procedures and, therefore, access to the courts is essential to

the decision of such questions"); *United States v. Nixon*, 418 U.S. 683 (1974) (relying upon *Marbury v. Madison*, 5 U.S. 137 (1803), in refusing to extend an absolute executive privilege of confidentiality for all Presidential communications); *Roviaro v. United States*, 353 U.S. 53, 59-60 (1957) (holding that the informant's privilege is not an absolute executive privilege and is subject to a number of reviewable exceptions); *United States v. Reynolds*, 345 U.S. 1, 8 (1953) (judicial review is essential over executive invocations of the state secrets privilege because "a complete abandonment of judicial control would lead to intolerable abuses"); *Bergman v. United States*, 565 F. Supp. 1353, 1363-67 (W.D. Mich. 1983) (refusing to allow the FBI to invoke the informant's privilege to escape civil liability because executive branch obligations cannot transcend the interests of justice and the executive branch cannot effectively sit in judgment on its privilege assertion as this is contrary to separation of government powers). *See also Marbury*, 5 U.S. at 177, 180 ("[i]t is emphatically the province and duty of the judicial department to say what the law is," and it would be "worse than solemn mockery" for a judge to swear to discharge his/her duties agreeably to the Constitution if the Constitution "is closed upon him, and cannot be inspected by him").

Given that there are literally millions of federal employees who hold security clearances, the Sixth Circuit's decision is no small matter. At worst, it is a direct countermeasure to our democratic society which we have always fought our hardest to uphold[5].

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5. In addition to these equal protection arguments based upon the invidious discrimination perpetrated against Tenenbaum, it should also be noted that Tenenbaum's Fifth Amendment due process rights were also violated when he was not informed of the fact that the Army was illegally conducting criminal counterintelligence investigations into him since at least 1992, and when he was not read his *Miranda* rights on at least two separate occasions -- during his February 3, 1997 interview wherein he was coerced into submitting to the polygraph examination and a February 14, 1997 meeting with FBI and Department of Defense

(Cont'd)

CONCLUSION AND RELIEF SOUGHT

For all the foregoing reasons, Petitioner, David Aaron Tenenbaum, respectfully requests that this Honorable Court grant the instant Petition for Writ of Certiorari, or in the alternative, reverse the decision of the United States Court of Appeals for the Sixth Circuit, and remand this case for further proceedings and trial.

(Cont'd)

agents, one of whom had interviewed Tenenbaum on February 3rd. R. 8, Response, Exh. F (Deposition of Robert Riley), Vol. I at 131-136, JA at 335-336; R. 8, Response, Exh G (Memorandum for Record), JA at 393-404.

Tenenbaum's due process rights were further violated because the Army's reasons for revoking his security clearance are the same anti-Semitically charged allegations which formed the basis for the pretextual security clearance investigation, and which were completely disproved by the FBI criminal investigation. R. 8, Response, Exh. P (Deposition of Paul Barnard), Vol. II at 100-103, JA at 709-710. Although it is undisputed that federal employees do not maintain a property interest in their security clearances (*see, e.g., Department of the Navy v. Egan*, 484 U.S. 518, 530-32 (1988)), it is a basic tenet of our system of justice that no public sector employee may suffer adverse employment actions as those experienced by Tenenbaum based upon *zero* evidence.

In addition, Tenenbaum was denied liberty interests on several grounds. During the February 3, 1997 interview and the February 13, 1997 polygraph examination, Tenenbaum felt that he was not free to leave based upon the Department of Defense's agents' coercive and threatening conduct. R. 4, Mot. to Dismiss, Exh. A (Compl. and Demand for Jury Trial), JA at 64-66. Also, due to being vilified as an Israeli spy as a result of the pretextual security clearance investigation, Tenenbaum was forced into hiding for several days to avoid the flood of media personnel. R. 4, Mot. to Dismiss, Exh. A (Compl. and Demand for Jury Trial), JA at 70-72. Furthermore, Tenenbaum genuinely feared for his life and the safety of his family due to being vilified as a traitor and Israeli spy. *Id.* Additionally, Tenenbaum and his family were terrorized by intense 24-hour surveillance by agents from various government agencies who, at one point, almost ran over Tenenbaum with their surveillance vehicle. *Id.*

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED AND FILED AUGUST 29, 2002

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 00-2394, 01-1704

DAVID AARON **TENENBAUM**,

Plaintiff-Appellant,

v.

LOUIS **CALDERA**,

Defendant-Appellee.

August 29, 2002, Filed

OPINION

JUDGES: Before: KENNEDY, SUHRHEINRICH and BATCHELDER, Circuit Judges.

KENNEDY, Circuit Judge.

I. Background

David Aaron Tenenbaum brought suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, alleging that the Army targeted him for criminal investigation and revocation of his security clearance because he is an orthodox Jew. The district court dismissed his claim based on the nonjusticiability of security clearance decisions, and noncompliance with the 45-day statute of limitations for federal employees, 29 C.F.R. § 1614.105(a).

Appendix A

Tenenbaum has worked for the Army since 1984 as a mechanical engineer specializing in combat vehicle survivability. His responsibilities included working cooperatively on joint projects with foreign governments, particularly Israel. In 1992, the Army began covertly to investigate Tenenbaum for espionage on behalf of Israel. The investigation allegedly began after accusations from Tenenbaum's co-workers that he was a security risk because he was Jewish, spoke Hebrew, and worked with Israeli military officers. Tenenbaum also alleges that the Department of Defense had a policy of targeting American Jews as counterintelligence risks. Pursuant to this policy, Tenenbaum claims he was subject to a harassing debriefing regarding his official trips to Israel, was forced to take a polygraph examination, and had his security clearance suspended. In 1994 and 1996, the FBI formally investigated Tenenbaum, but found insufficient evidence to merit prosecution. Tenenbaum also alleges that based on his religion he was denied promotions, "monetary incentives," and training opportunities.

Federal employees must exhaust their administrative remedies by contacting an EEO officer within 45 days of the alleged discriminatory event. 29 C.F.R. § 1614.105(a)(1). Tenenbaum contacted an EEO officer on June 3, 1999. According to the evidence presented by the plaintiff, all of the allegations mentioned thus far occurred prior to the 45 day period that began on April 19, 1999.

Tenenbaum notes that he currently is physically isolated from his former co-workers; that he is viewed suspiciously by his fellow employees; and that he is not permitted to work

on projects of significance to his career, particularly those involving Israel. He also alleges that on February 4, 2000, the Army revoked his security clearance despite the lack of evidence of wrongdoing. The thrust of Tenenbaum's argument is that these circumstances establish a continuing violations exception to Title VII's statute of limitations. We affirm the district court's decision that the continuing violations exception does not apply in this case.

II. Analysis

A. Justiciability of Executive Decisions Regarding Security Clearance

The merits of an executive branch decision to deny security clearance generally are not reviewable. *Dept. of the Navy v. Egan*, 484 U.S. 518, 98 L. Ed. 2d 918, 108 S. Ct. 818 (1988). *Egan* dealt with the narrow question of what statutory authority was vested in an executive agency to review the substance of a security clearance decision. Its separation of powers rationale establishes that, absent express congressional authorization, sensitive security clearance decisions should be free from interference by judicial officers with little expertise in the important and complex realm of national security.[1] Because Title VII would require a court to weigh the validity of the executive's proffered reasons for revoking a security clearance, judicial review would constitute precisely the sort of interference criticized in *Egan*. Four other circuits agree, holding that security clearance decisions are not justiciable under Title

1. Tenenbaum does not argue that Title VII contains any express authorization for judicial review of security clearance decisions.

VII. *Ryan v. Reno*, 335 U.S. App. D.C. 12, 168 F.3d 520 (D.C. Cir. 1999); *Becerra v. Dalton*, 94 F.3d 145 (4th Cir. 1996), cert. denied, 519 U.S. 1151, 137 L. Ed. 2d 221, 117 S. Ct. 1087 (1997); *Perez v. FBI*, 71 F.3d 513 (5th Cir. 1995), cert. denied, 517 U.S. 1234 (1996); *Brazil v. Dept. of the Navy*, 66 F.3d 193 (9th Cir. 1995), cert. denied, 517 U.S. 1103 (1996).

Executive decisions regarding security clearance are not completely immune from scrutiny. Judicial review may be appropriate, for example, where the plaintiff alleges a violation of constitutional rights. *See Webster v. Doe*, 486 U.S. 592, 100 L. Ed. 2d 632, 108 S. Ct. 2047 (1988). Tenenbaum's invocation of this exception is puzzling since his amended complaint does not contain any constitutional claims.

Courts may also be permitted to hear cases in which an agency violates its own regulations in the process of revoking a security clearance. *See Service v. Dulles*, 354 U.S. 363, 1 L. Ed. 2d 1403, 77 S. Ct. 1152 (1957). Tenenbaum raises this issue for the first time in his opening brief on appeal. He presented no specific cause of action to the district court regarding the violation of any regulations. This issue, therefore, is not properly before this court. *See Taft Broadcasting Co. v. United States*, 929 F.2d 240, 243 (6th Cir. 1991). Even if Tenenbaum's allegations of failure to comply with Army regulations were properly presented and meritorious, the remedy would be for the district court to order the agency to correct its procedural errors and not, as Tenenbaum suggests, to open the decision to a review on the merits. Tenenbaum urges the court to make

an exception to the general rule of non-reviewability in the name of justice, but he does not articulate what injustice would result from forcing him to litigate these complex and fact-intensive regulatory issues via the proper channels, where a full record can be developed.

Given that the decision to revoke Tenenbaum's security clearance is not justiciable under Title VII, the decision cannot constitute an act of discrimination sufficient to bring Tenenbaum's claim within the 45 day time period.

B. The Continuing Violations Doctrine

This circuit has previously identified two categories of continuing violations. The first arises where there is a series of continuous and sufficiently related discriminatory acts, and at least one of those acts occurred within the statutory period. *Haithcock v. Frank*, 958 F.2d 671 (6th Cir. 1992); *Hull v. Cuyahoga Valley Joint Vocational Sch. Dist. Bd. of Educ.*, 926 F.2d 505 (6th Cir. 1991). The second arises where there exists a longstanding and demonstrable policy of discrimination. *Alexander v. Local 496, Laborers' Int'l Union*, 177 F.3d 394 (6th Cir. 1999); *Dixon v. Anderson*, 928 F.2d 212 (6th Cir. 1991), cert. denied, 528 U.S. 1154 (2000).

The district court found that neither of these categories apply in this case.

1. Serial Violations

This category of continuing violations doctrine has been cabined by the Supreme Court's recent decision in *National Railroad Passenger Corp. v. Morgan*, 122 S. Ct. 2061 (2002).

Appendix A

The *Morgan* decision held that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." 122 S. Ct. at 2066. In so holding, the Court reversed the Ninth Circuit's application of its serial violations doctrine to Morgan's discrimination claim.[2] The Ninth Circuit's test is closely analogous to this Circuit's continuing violation doctrine.[3] Because the Court held that the Ninth Circuit's serial violations test was too permissive as applied to claims of individual discrimination, this Circuit's doctrine is also implicated as applied to Tenenbaum's case.

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2. The Supreme Court's decision affirmed the application of the serial violations doctrine to hostile work environment cases. *Morgan*, 122 S. Ct. at 2066 (noting that it is irrelevant "that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of assessing liability."). In a prior case, the Court affirmed the application of the serial violations doctrine to pattern or practice cases. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380, 71 L.Ed.2d 214, 102 S. Ct. 1114 (1982).

3. To be more precise, the Ninth Circuit held that a plaintiff can establish a continuing violation either by showing "a series of related acts one or more of which are within the limitations period . . . if the evidence indicates that the alleged acts of discrimination occurring prior to the limitations period are sufficiently related to those occurring within the limitations period," or by showing "a systematic policy or practice of discrimination that operated, in part, within the limitations period—a systemic violation." 232 F.3d 1008, 1015-16 (2000). This second category, like this circuit's "longstanding and demonstrable policy" category, is not implicated by the Court's decision in *Morgan*.

However, this case does not require us to confront the issue of precisely how *Morgan* implicates our continuing violations doctrine, since it is clear that even under the old, more liberal standard, Tenenbaum has not established that a discriminatory act occurred in the limitations period. Tenenbaum would have to show some discriminatory act that occurred on or after April 19, 1999. As the district court noted, there is not any indication of a specific act on any particular date. Tenenbaum suggests that discrimination took place "each and every day of the limitations period" in that he was subject to discriminatory job assignments and work responsibilities, including precluding his access to classified information, limiting his contact with Israelis, physically isolating him from his former co-workers, and preventing him from participating in the projects on which his career was based. As a matter of law, such adverse conditions of employment *could* constitute identifiable acts of discrimination. *See, e.g., Held v. Gulf Oil Co.*, 684 F.2d 427 (6th Cir. 1982). However, such acts could also be the present effects of past discrimination, which do not trigger a continuing violations exception. *Dixon v. Anderson*, 928 F.2d 212, 216 (6th Cir. 1991).

The district court made the factual determination that the current conditions of Tenenbaum's employment are a consequence of the fact that he was accused — even if wrongfully — of espionage and had his security clearance revoked. In a supplementary letter submitted after oral argument, Tenenbaum notes that although he was reinstated at TACOM in March of 1998, his security clearance was not officially and finally revoked until February 4, 2000.

He therefore asserts that the disparate treatment preceding February 2000 cannot be attributed to the lack of a security clearance. However, his clearance had been suspended during the course of the criminal investigation, and Tenenbaum has provided no evidence that it was restored prior to the government's official decision to revoke it in February 2000. In fact, the record contains a letter dated March 9, 1999, informing Tenenbaum of the Army's preliminary decision to revoke his security clearance. (J.A. Vol. I at 124).

Although the espionage investigation might have been motivated by invidious discrimination, Tenenbaum has not alleged facts sufficient to support an inference that all subsequent adverse employment acts were similarly motivated.[4] Indeed, Tenenbaum has alleged no specific facts at all regarding these acts. *See Burzynski v. Cohen*, 264 F.3d 611, 618 (6th Cir. 2001) (finding no continuing violation where plaintiff's complaint does not allege the circumstances of the adverse actions and provides no evidence of discriminatory animus regarding those particular acts). We cannot reverse the district court's conclusion that, based on the facts in the record, Tenenbaum's current employment status, if based on discrimination, is the present effect of past discrimination.

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4. Such an inference is permissible if the facts of the case support it. *See Alexander v. Local 496, Laborers' Int'l Union*, 177 F.3d 394, 409 (6th Cir.1999) (noting that the court may look to past discriminatory acts and practices in order to show motive and intent as to present acts and practices).

2. Longstanding and Demonstrable Policy of Discrimination

The district court did not err in finding no longstanding and demonstrable policy of targeting American Jews as counter-intelligence risks. In order to qualify under this category of continuing violations, "appellant must demonstrate something more than the existence of discriminatory treatment in his case." *Haithcock*, 958 F.2d at 679. "The preponderance of the evidence must establish that some form of intentional discrimination against the class of which plaintiff was a member was the company's standing operating procedure." *EEOC v. Penton Indus. Publishing Co.*, 851 F.2d 835, 838 (6th Cir. 1988).

Tenenbaum claims that a Department of Defense newsletter, which accused Israel of pursuing American Jews for intelligence gathering activities, proves that the Army had an official policy of discrimination against American Jews. The district court properly found that the newsletter, standing alone, did not constitute an official policy. Tenenbaum presents no evidence of similar discrimination against other American Jews, nor does the record reveal any evidence of class-wide discrimination. On the contrary, the facts alleged in the complaint clearly show that the Army was, in the words of the district court, "targeted like a laser at Mr. Tenenbaum."

C. Equitable Tolling

Tenenbaum's final argument is that if his complaint is untimely, it is only because he was actively misled by the Army's subterfuge in hiding their discriminatory motives for

the investigation. He therefore asks the court to apply the equitable tolling doctrine to excuse his untimeliness. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 71 L. Ed. 2d 234, 102 S. Ct. 1127 (1982).

This court reviews a district court's decision regarding equitable tolling for an abuse of discretion. *EEOC v. Kentucky State Police Dept.*, 80 F.3d 1086 (6th Cir. 1996). To "successfully raise a claim of equitable tolling, a party must show either fraudulent concealment of the critical facts that would lead one to know that he can sue, or a misrepresentation of those facts — whether made in good faith or not — that was calculated to induce a plaintiff to forego the right to sue." *Jones v. General Motors Corp.*, 939 F.2d 380, 385 (6th Cir. 1991).

Tenenbaum claims that he did not know the full extent of the Army's discrimination against him because the Army intentionally concealed certain aspects of its investigation. This is not a reason to toll the statute of limitations. A plaintiff need not know all the facts of his case in order to comply with Title VII's administrative exhaustion requirement. At least as of October 1998, when he filed his original civil rights lawsuit, Tenenbaum knew enough critical facts to conclude he was the victim of religious discrimination. At that point, Tenenbaum chose to file a lawsuit rather than contact his EEO officer. There is no allegation that Tenenbaum was unaware of the procedural prerequisites to filing an employment discrimination claim against the federal government. There is no allegation that the Army actively misled him as to his rights and responsibilities regarding Title VII claims. The district court did not abuse its discretion in declining to apply equitable tolling in Tenenbaum's case.

Appendix A

Accordingly, we affirm the district court's decision to grant summary judgment to the government on Tenenbaum's Title VII cause of action.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DATED OCTOBER 19, 2000

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 00-CV-70309

DAVID AARON TENENBAUM and
MADELINE GAIL TENENBAUM,

Plaintiffs,

v.

LOUIS CALDERA, Secretary of the
Department of the Army,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

This matter is before the court on Defendant's motion to dismiss pursuant Federal Rule of Civil Procedure 12 (b)(1), filed on March 31, 2000. Plaintiffs filed a response on May 19, 2000, and Defendants replied on May 30, 2000. On July 26, 2000, with leave of the court, Plaintiffs filed a First Amended Complaint. Defendant renewed its motion to dismiss on August 21, 2000, and no additional briefs were

filed by Plaintiffs. The court conducted a hearing on Defendant's motion on October 18, 2000.

For the reasons stated fully on the record, IT IS ORDERED that Defendant's Motion to Dismiss is GRANTED.

s/ Robert H. Cleland
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

October 19th, 2000

APPENDIX C — HEARING TRANSCRIPT BEFORE THE HONORABLE ROBERT H. CLELAND DATED OCTOBER 18, 2000

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 00-CV-70309

DAVID AARON TENENBAUM and
MADELINE GAIL TENENBAM,

Plaintiffs,

-vs-

LOUIS CALDERA,
SECRETARY OF OPERATIONS OF ARMY,

Defendants.

BEFORE THE HONORABLE ROBERT H. CLELAND
United States District Court Judge

[2] * * *

THE COURT: Counsel, thank you for your patience while I was concluding a telephone conference. This is Tenenbaum versus Caldera, 00-CV-70309. For plaintiff?

MR. MATEO: Good afternoon, Your Honor, Juan Mateo, appearing on behalf of David and Madeleine Tenenbaum.

Appendix C

THE COURT: Mr. Mateo. And soon to be only David Tenenbaum?

MR. MATEO: Correct.

THE COURT: Based upon the pleadings. And for the defendants?

MR. CAPLAN: Peter Caplan, Assistant U.S. Attorney. With me at counsel table is William Woodard, also Assistant Attorney.

THE COURT: Thank you. First things first. It is clear that the plaintiffs agree that there is no consortium claim under the Title VII?

MR. MATEO: That's correct.

THE COURT: Cause of action. And so you don't need to spend any additional time on that. We do have defendant's motion for dismissal based upon, principally based upon lack of timeliness. But Mr. Caplan, I'll hear [3] you comment about the substance of your motion in more detail.

MR. CAPLAN: Yeah.

THE COURT: As you wish.

MR. CAPLAN: Again, good afternoon, again. Good afternoon. I'm going to be somewhat brief because I'm rather confident that the court is pretty familiar with the facts giving rise to this lawsuit, along with the substance of my motion.

Appendix C

The court is correct in characterizing our motion, primarily as one based on time limits under the relevant C.F.R. regulation, 29 C.F.R. Section 1614.105, which sets forth the time within which an aggrieved federal employee is to bring his grievance to the attention in the first instance of an EEO counselor at his place of work.

And basically, the rule, as set forth in sub-section one of A) is an aggrieved person must initiate contact with a counselor within forty-five days of the date of the matter alleged to be discriminatory, or in the case of personnel action within forty-five days of the effective date of the action.

Now, plaintiffs are somewhat cagey with regard to what he said to the EEO counselor, and thereafter what he put in his formal EEO complaint, and thereafter what he's put in his complaint in this case as to what the [4] action complained of is.

But viewing the complaint which forms the parameters of this federal lawsuit, I think we can pretty much be satisfied that the matter which gives rise to this lawsuit is — came to a head in February of '97 when Mr. Tenenbaum participated in a polygraph examination by a polygrapher connected with the defense investigative service; and thereafter, his residence was subjected to a search by the FBI, and as a result of the alleged admissions made during that polygraph examination and during the polygraph examination post-interview.

Setting aside for the moment whether those actions are actions of his employer, which are subject to Title VII

review, the timeliness of the complaint which gives rise to this Title VII lawsuit is not much in doubt. It's clearly untimely. It was filed on June 3, '99, over two years after those actions.

The EEO complaints thereafter, after some administrative back and forth and the filing of a formal EEO complaint was dismissed for, among other reasons by the agency, on timeliness grounds.

Now, faced with that rather obvious timeliness problem, plaintiff's response is this rather ample compilation of the discovery materials or some of them in a related Bivens and Federal Tort Claims Act suit.

[5] And if I can distill plaintiff's argument down to its bare essentials, if I can be so presumptious, it is, until we took all these depositions, David Tenenbaum did not know the precise scope and nature of the discrimination to which he had been subjected, based upon his ethnicity, based upon his religion, that being an Orthodox Jew.

Plaintiff is wrong, based on the facts of the law. On the law, he doesn't have to have all the I's dotted and the T's crossed in order to go visit the EEO counselor at his place of employment.

He does not have to have discovery completed or discovery commenced or all of the motives of his co-workers and supervisors clearly on the record under oath in order for him to take the preliminary step of meeting with an EEO counselor. That would set the law on its head. It would completely deflate the purposes of the EEO process.

One is to go to an EEO counselor at his place of federal employment to invoke the process quickly while memories are fresh; and critically, to give the EEO counselor an opportunity to investigate the case.

Plaintiff in this case seems to suggest that the case has to be fully investigated under the Federal Rules of Civil Procedure; specifically, those between Rules 26 and 37, if I recall correctly, the discovery rules, before he can even go to an EEO counselor.

[6] THE COURT: Would there be any exception that you would recognize, academically, in a circumstance where a plaintiff filed a federal action predicated upon something other than discrimination; let's say, some kind of wage dispute, contract dispute, perhaps.

And in the course of discovery in that other action, came across a document that indicated some kind of religious status discrimination, you know, some notation from a supervisor, we're going to knock this guy's grade, pay grade down because he's, because he's thus and such, Jewish or whatever.

And this, and the discovery of that action comes two years after the apparent fact, could you admit to the possibility of timely complaint under the EEO process under situations that might be similar to that?

MR. CAPLAN: Perhaps it's possible, depending on what specific personnel action the complainant thereafter complained about. I suppose it would be the reduction in pay that is referred to in this, in this memorandum.

THE COURT: Yeah. I'm thinking in my hypothetical he's thinking, gee, you know, this is a contract problem. This is a, this is a, you know, I've got a personality problem with my supervisor. And only later does he discover it's an insidious discrimination problem, not just a personality problem, something like that, is that [7] possible?

MR. CAPLAN: Perhaps on an academic level, it's possible, although I have to refer to the regulation which says within forty-five days of the date of the matter alleged to be discriminatory.

And I suppose the question, I'm begging the question. Because the question is it wouldn't even allege to be discriminatory at that point. Perhaps under those unusual circumstances it is possible, although I do have to confess that having handled numerous discrimination cases in my fifteen years at the U.S. Attorney's office, I have never seen any plaintiff to, in any way, be reticent about seeing allegations or, or conspiracy of discrimination behind every personnel action, but I suppose on an academic level that is possible.

THE COURT: You have a rather select universe of employees that you've had the pleasure of dealing with.

MR. CAPLAN: Those who have filed lawsuits, of course.

THE COURT: Yes. All right. Well, I think that that kind of circumstance, the extension, or the, perhaps arguable, or extreme extension of the situation that Mr. Mateo puts forth for the plaintiff.

MR. CAPLAN: That is correct, but I don't believe on the facts he can shoehorn himself into that academic [8] theory, if you will. Because as of October of '98, what's that, a year and a half before he goes to the EEO counselor, he's filed a Bivens suit and a Federal Tort Claims Act suit in federal court here setting forth in painstaking detail the theories that pretty much give rise to this lawsuit.

I was subjected to this wide range, and far-reaching conspiracy which had the involvement of numerous federal investigators and co-employees because I'm an Orthodox Jewish individual who had involvement with Israeli Nationals in my employment.

And that is the theory of the Bivens suit filed in October of '98. And that's pretty much the theory of this suit. And how he can claim that he did not have sufficient, had not coalesced or crystallized a sufficient theory, or was not aware sufficiently of the alleged discriminatory basis of all these allegedly bad things that happened to him until forty-five days before June 3, 1999, the date on which he first contacted an EEO counselor, simply, is a duplicities shoehorn of the facts in this case. Because plaintiff was well aware, well aware of what he, the theory of this case many, many months before he first invoked his EEO rights at TACOM.

Indeed, one of the claims that was dismissed in the Bivens suit was a state Elliot-Larsen claim. Well, we [9] know now that you can't file a state Elliott-Larsen claim against, arising out of federal employment. You have to take the analogous federal track, that being a Federal Title VII suit.

Certainly if he had the resources, the intelligence, the facts at hand, the conclusions at hand to set forth a state Elliott-Larsen claim, a state employment discrimination claim in October of '98, I fail to see, I fail to see how plaintiff can stand here and argue that it wasn't until forty-five days before June 3, 1999 when I first became aware of the discriminatory nature of the actions in this case.

And for that reason, granting the court's theory as to, there could be a situation perhaps in which factors come to a plaintiff's awareness long after the personnel action, giving rise to a first time, to a thought of discriminatory evidence. That is clearly not this case on the uncontested facts.

Of course, plaintiff argues that there is a continuing violation here to try and save his case from dismissal. The facts don't, don't support that, as a matter of law.

Even where you are alleging a continuing violation, you must cite a discrete act that occurred within forty-five days of the time of contacting an EEO counselor.

[10] There must be one, at least one act on which you are hooking your EEO claim that is timely. And plaintiff, in all of that, hasn't cited me, I don't believe, to any act that occurred within forty-five days of June 3, 1999.

THE COURT: Was that not the request made by the?

MR. CAPLAN: EEO counselor?

THE COURT: Yeah, at the administrative level to which counsel responded with a letter?

MR. CAPLAN: Yes. I believe.

THE COURT: Of 4/8, February 13 or something?

MR. CAPLAN: I think it was probably summer, fall of '99, because he files the EEO. There's a letter of October 5, I believe, from Mr. Mateo, attempting to respond to that concern, and, I frankly, don't believe that that specific issue was addressed in that letter.

THE COURT: Well, I mean, I think that that was, that was the, the suggestion of specificity, to the extent that there was one regarding this discrete act within the preceding forty-five days.

MR. CAPLAN: I believe that that was counsel's effort to respond to those concerns by the EEO.

THE COURT: Yes, September 21 received, and it was dated.

MR. CAPLAN: It's Exhibit G to my papers, Your [11] Honor.

THE COURT: G. Okay. October 5, you're correct, received sometime later. A day or two later.

MR. CAPLAN: The EEO official did not find this to sufficiently respond to the timeliness concerns, and, therefore, denied the, the — refused to further process the complaints by letter of October 27, which is Exhibit L to my papers, and my argument here is that that EEO official was correct.

THE COURT: Well, among other things, he alleged, Mr. Mateo did, that the plaintiff is not allowed access to certain files and materials classified files and projects. In part, it seems that that is claimed as being a day by day, continuing act, a discrete event of which a discrete day of which would have occurred presumably within forty-five days preceding contacting the EEO officer. Is that not a tenable claim?

MR. CAPLAN: Not — first of all, insofar as denying — that denial arises out of his security clearance status, and the issue of the propriety of the security clearance, and the issue of what he can be authorized to have access to, in light of his lack of a security clearance is not a matter that is reviewable in this court, or justiciable under the Supreme Court ruling of Navy versus Egan.

[12] THE COURT: So to the extent that there's anything that relates then directly to the security clearance issue, you would argue that as a matter of law it cannot constitute any, anything known as a discrete act under Title VII, timeliness jurisprudence?

MR. CAPLAN: That is correct. And I would further state that that all flows from the discrete act that occurred in February of '97; and to suggest that the ongoing effects of a past discriminatory act somehow in and of themselves constitute discrete acts, that can make an EEO claim timely, I think proves too much.

Certainly the employee who alleges that he or she was not hired for a particular job continues to be not hired.

The person who is fired continues to be not fired. The person who is not promoted continues to be not promoted. I have no further comments, unless the court has any specific inquiries.

THE COURT: Thank you, Mr. Caplan. Mr. Mateo.

MR. MATEO: Your Honor, the reviewing of the documents that have been filed in this case, I think one of the things I attempted to stress in our brief was that this factual scenario is quite unique from your typical Title VII EEOC problem.

The reality is that, regardless of what the government is claiming about this forty-five day rule, [13] compliance with that forty-five day rule by David Tenenbaum prior to 1997 would have been a virtual impossibility; and by that I mean that we have, through the declassification of various documents and through the sworn testimony of various agents and federal employees, we have documented as recently as a month or so ago that there have been a series of investigations into David Tenenbaum, all of which were classified top secret, all of which he has not determined the full extent of which, of which, even today, as I stand here before the court at the podium.

So as to those, those cases, the 1991 military intelligence into Mr. Tenenbaum, of which we don't even have a file on. We just know that it happened. We don't know who the agents are. As to the multiple FBI preliminary investigations into David Tenenbaum's employment or status as an employee at TACOM, again, we, on which we don't

have any files on, but we know they existed, they took place. There is no way that David Tenenbaum could have complied with the forty-five day rule.

Now, we allege when we filed this lawsuit in October of 1998 an Elliott-Larsen Civil Rights claim under the Michigan Discrimination Statute and in the fact, the essence of that claim was against two individuals; a Jack Parks, a supervisor of Mr. Tenenbaum, and an Ed Jakovich, another supervisor, and that really dealt with the essence [14] of, of promotional issues.

And, although we allege that the underlying investigation into David in February of '97 was also AntiSemitic. The real claims that we're addressing now, Judge, have not been raised before.

We had a hearing in front of Judge Victoria Roberts who dismissed the, the Elliott-Larsen claim and informed us that we were to proceed with the EEOC administrative remedies.

Now, as I understand the government's argument, they're whole case here, they're whole argument here rests on, their position that we have not, in either the EEOC complaint or in our complaint in this case, alleged any discrete act that falls within the forty-five day period when Mr. Tenenbaum made the complaint, had the informal meeting with the EEOC which was in June of 1999.

Well, Judge, in a government-attached exhibit which attaches Mr. Tenenbaum's typewritten complaint to the

EEOC, which is Exhibit D, besides going into the background history of this case, Mr. Tenenbaum indicates, "I have not been allowed to work or deal with Israel or anyone from the Israeli military.

We plea in paragraph 44 of the complaint that "plaintiff returned to work at TACOM in March, 1998, however, plaintiff is not allowed to work with Israelis, [15] nor is he allowed to work on any projects of any significance. Plaintiff is isolated, not only from co-workers, but from working on any type of projects that he had successfully worked on for many years at TACOM". Those facts continue today, today being, what is it, October 18, 2000.

Mr. Tenenbaum remains in the same position. He is, in effect, isolated at work. He cannot have any responsibilities of the responsibilities that he had before. He cannot even come in contact socially with members of the Israeli government. And he has, in essence, been treated, no questions, differently than any other similarly situated tank engineer at TACOM. Now, we have continued with depositions.

THE COURT: Well, why are those not simply, as Mr. Caplan argued, the residual effect of an action that was taken with respect to the security clearance on considerable time previous?

MR. MATEO: Because, Judge, the security clearance issue deals with whether Mr. Tenenbaum has access to classified information or not. That issue has nothing to do with whether Mr. Tenenbaum has access to any other projects that are not classified or has access to anyone else who may be an Israeli or Orthodox Jew working for the government of Israel.

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[16] Judge, the facts are in reason. We detailed the one deposition after another. The facts are that Mr. Tenenbaum, although he has been accused of espionage and improper activities, that no one, no one in this case has substantiated Mr. Tenenbaum's violated any rule or regulation of the Department of the Army, let alone committed an act of espionage. And yet he continues to be isolated and treated in a way that he has different from anybody else.

THE COURT: Then alternatively, why is that not, as Mr. Caplan has argued, simply the residual effect of an allegedly, you can say, for sake of argument, a, a proven discriminatory act?

MR. MATEO: I don't understand the question. I'm sorry.

THE COURT: Well, if Mr. Caplan's argument is that it is not the same thing as identifying a discrete act to simply identify a continuing effect of a discrete act that occurred more than forty-five days previous.

MR. MATEO: No.

THE COURT: If a discriminatory act occurred and its ripple effects continue on for months and months and months and perhaps years, it's not sufficient for the defendant to identify a day upon which one of those ripple effects occurred; that is, one more day in a series of days [17] in which he was forbidden from having contact with foreign agents. That's not a discrete act.

MR. MATEO: Well, I think they are discrete acts when those are the directions he received from the supervisors,

whenever it is that he is, you know, from, on a week-to-week basis, whenever it is he is supposed to be assigned any work.

Okay. Just this week he's been assigned some work. The work doesn't allow him to, to do the things that he was able to do, regardless of whether he has a security clearance or not. So those are continuing series of acts by his supervisors and personnel at TACOM that effect his work adversely.

And I think it's — when we look at the remedial and equitable doctrine that supports Title VII is we shouldn't allow the government to engage in all of these series of discriminatory acts and then let them hide behind a forty-five day rule that, under the facts in this case Mr. Tenenbaum could never have complied with. It would have been impossible as to most of the events that occurred prior to the filing of this EEOC complaint.

You know, Judge, we amended the complaint and added the testimony of, of Richard McLellan, his current supervisor, who testified in July of this year that currently Mr. Tenenbaum is what I've just told you, being [18] treated differently and being subjected to, to these adverse employment decisions by TACOM.

Mr. McLellan was very open about how he feels that he could trust Mr. Tenenbaum with his secrets, with the secrets of the United States. And he also established when I asked him the question; do you think any of this would be happening to David Tenenbaum that we've been talking about if it weren't for the fact that he's Jewish.

And his answer is, no, I believe that none of this would be going on if Mr. Tenenbaum weren't Jewish.

And I think for the government to say, well, you know, whatever is happening now is really the result of what happened in December, or February of 1997, that it really has to do with a security clearance that this court nor any other court should look into, I think is just an unfair process when the doctrine of law that substantiates rights under Title VII is equitable in nature.

And I cite cases, Judge, that stand for the proposition that when we have a series of discriminatory instances that occur over a period of time, they're actionable as long as we can set forth any act occurred within the time period of the forty-five day period. And I cite Havens Realty Corp. versus Coleman in a United States Supreme Court decision cite decided in 1982.

I also indicate, Judge, that there is this [19] doctrine that we have discussed, or law discussed it, regarding equitable tolling. And in effect, that doctrine of equitable tolling suggests that, that a plaintiff should not be held to the statute of limitations of the EEOC rules and regulations when the Plaintiff established that there has been extraordinary steps to prevent him from asserting his rights.

Well, when I talk about David Tenenbaum was placed in an impossible situation to ever complain about this because he didn't know about this to begin with, then those, those actions taken by the government should be aired out in court and Mr. Tenenbaum should have his day in court with regard to this issue.

But when we're established conclusively, and there's nothing rebutted here in the evidence in this case by the government that suggested that I'm misleading the court, that suggested that Mr. Tenenbaum has, has not continued to suffer from these acts of discrimination, but I think, Judge, that the government fails in its own argument.

We have proven that he's still subject to these discrete acts of discrimination. We have proof then that they have continued to occur throughout, not only this litigation but as I stand here before you today.

THE COURT: What's one example of a discrete act [20] of discrimination?

MR. MATEO: Well, when he was given his job assignment — currently, on the current project it's made clear to him that he cannot deal with any of the projects that were non-classified that he was doing before. One). Two), he cannot have contact with other employees on the base. Now, what kind of — how does a security issue impact on that? I mean, you know, three), he can't have contact with members of the Israeli government when the evidence is he has done nothing wrong with members of the Israeli government.

There is the sub-issue, Judge, that the government, I think, really wants this court to deal with, and that is that this whole question that, under the Navy versus Egan U.S. Supreme Court decision, that no one, no federal judge can allow to be litigated the bases for the revocation of his clearance.

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Now, we had this exact same issue raised with Judge Victoria Roberts in the defendant's original motion. And Judge Roberts ruled, and I believe I attached her, her opinion, or I, at least quoted pages fourteen and fifteen of her opinion.

With regard to responding to the government's reliance on Navy versus Egan, the court indicated quote, "The court finds that defendant's position represents an [21] exception that would swallow the rule. Taken to its logical end, defendants would be immuned, not just from the review of their decisions, but from, from review of any actions arguably related to the investigation underlying that decision".

In essence, defendant's attempt to escape potential liability for their actions by seeking refuge after their power to make national security decision. The law, however, does not and should not go that far. And defendant's appear to recognize this.

The fact that they saw a search warrant from a federal judge is in itself evidence that they did not believe that they were so immune; thus, while the court defers to the defendant's judgment, it need not sit idly where they allegedly violate the laws in gathering the facts related to that judgment.

The court goes on to indicate that we are allowed to review the defendant's underlying comments with regard to reaching a joint agreement revoking or suspending Mr. Tenenbaum's security clearance.

Judge, I think that, I think that with the sworn testimony we would attach, the various exhibits that we've

attached, you know, that the government has just not made their case here. And I think for the court to dismiss this case would just be the ultimate travesty in justice.

[22] THE COURT: Okay. Mr. Caplan.

MR. CAPLAN: I think, perhaps unknowingly, counsel made a very telling remark. He said -- among the things he said was that plaintiff continues to suffer from these acts of discrimination. I think that's pretty much a suggestion, if not a concession, that what we have, if anything, are the ongoing effects of a class discriminatory act. Now, he alleges that he continues to get job assignments that he feels are below him, not within his area of expertise, not matters that his particular training suits him for.

Again, I believe that those, that, the fact that he is in the situation he is now is merely a result of that which happened three and a half years ago, and that is the discrete act.

Also, I don't have the cite at my fingertips, and I'm not sure of the name of the case, but it was an Assistant U.S. Attorney somewhere in the Sixth Circuit. The case may have been called Hudson versus Reno, in which the Sixth Circuit held that there are certain minimus acts in everyday employment that just are not significant enough to make for a Title VII suit.

I believe in that case it may have been an AUSA's, an Assistant U.S. Attorney's annual evaluation. The court said it just was not going to get involved in the [23] issue of whether an AUSA's conduct or work product was, met standards, met,

or was satisfactory or clearly more than statistically or whatever the categories are. I think the issue —

THE COURT: — You don't know?

MR. CAPLAN: I just sign once a year. My supervisor comes in and says you did great again last year and just sign. And I just sign. I'm afraid to say.

Anyways, I think that, to the extent that plaintiff is arguing that he should have been working on a tank instead of a humvey or whatever, or this job assignment is not within my area of expertise is probably one of those types of assignments that you, federal courts, should not be involved in on a day-to-day basis.

Plaintiff throws an equitable tolling. He sets forth the test. And I don't think that there is anything David Tenenbaum can satisfy the test that extraordinary circumstances prevented him from filing an EEO complaint.

He would have, should have known where the EEO office is. I am sure that there are postings all over the tank plant advising employees of their rights under Title VII. And he was working there, at least since March of '98. Why it took him fifteen months to, to contact an EEO counselor, regardless of the reasons, it certainly wasn't because we threw any roadblocks in his way.

[24] That's all I have in response to Mr. Mateo's comments. Again he returned to work in March of '98. He didn't file an EEO complaint until fifteen months later. Thank you.

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THE COURT: All right. Thank you. Well, the court, of course, has reviewed the briefing. And thanks counsel for arguments. The court ultimately is persuaded that the statute of limitations problem that has been so specifically identified here by the government does require the court to dismiss the case.

The allegation is, and it is borne out, that Mr. Tenenbaum failed to timely exhaust administrative remedies under the circumstances here. A person believing that he may have been discriminated against is required to initiate contact, at least with an EEO counselor within forty-five days of the alleged discriminatory act, the discrete act, as it's known in the case law, in order to attempt informal resolution of the matter consistent with the Code of Federal Regulations, 29 C.F.R. Section 1614.105.1.5 (a)(1), "if a person fails to timely invoke those remedies or begin to attempt to invoke them the ensuing lawsuit is subject to dismissal consistent with the law". That is, I think, well recognized here, among others, Benford versus Frank, 943 F.2d, 609 at 612, Sixth Circuit, 1991.

[25] It is clear to the court from the presentations of counsel in having gone through, I must say, the extensive presentation of discovery material proffered by the plaintiff in an attempt to support the discrete act showing that is required. Nonetheless, the court must find that there first was an obvious awareness on the part of plaintiff, Tenenbaum, that there was what he thought of, as discriminatory activity taking place, certainly long before the forty-five day period before the filing of the EEO complaint.

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His original filing in the Bivens action which pends in this court, filed in October of 1998, included just such claims, religious claim, religious orientation discrimination claims, and a rather completely flushed-out version of the same species of complaint that is at the core of this Title VII complaint.

As to the continuing violation doctrine theory that plaintiff advances, the Sixth Circuit in Dixon versus Alexander, 928 F.2d 212, Sixth Circuit, 1991, said "the courts view the continuing violations situation as falling into two basic categories of narrowly limited exceptions to the ordinary rule that the statute of limitations are triggered at the time the alleged discriminatory act occurred. And the court's there quoted EEOC versus Penton Industries, 851 F.2d 835 at 837, Sixth Circuit, 1988.

[26] "The first of these two narrowly limited and exceptional categories arises where there is some evidence of present discriminatory activity giving rise to a claim of continuing violation; that is, where the employer continues presently to impose disparate work assignments or pay raise to similarly situated employee groups. The rationale behind this category is the employee admits an illegal act such as giving unequal pay for equal work each time the employer dispenses the unequal pay".

And that's a rough quote from the, from the Penton decision which cited at that point Hall versus Ledex, L-e-d-e-x, 669 F.2d 397 and 398, Sixth Circuit, 1982.

The Circuit Court emphasized that at least one of the forbidden discriminatory acts must have occurred within

the relevant limitations periods, which again is forty-five days preceding the filing. And, too, the statute of limitations period retired only in response to the discriminatory acts themselves, not in response to the continuing effects of past discrimination.

The second category of continuing violation arises where there's a long standing and demonstrable policy of discrimination unrelated incidents of discrimination, however, will not suffice to invoke that exception.

[27] There must be a continuing overarching policy of discrimination. Again, cited in Penton at 838, which at that point quoted Janikowski versus Bendix, 823 F.2d 945 at 948, Sixth Circuit, 1987.

"To establish a long standing and demonstrable policy a plaintiff must demonstrate something more than the existence of discriminatory treatment. There must be a specific allegedly discriminatory act within the limitation period. Mere existence of an alleged policy of violating the protection rights will not toll the running of the statute of limitations".

Haithcock versus Frank, 958 F.2d 671, at 679, Sixth Circuit, 1972. Plaintiff, Tenenbaum here has not alleged any discriminatory acts or religious faith discrimination by the government against persons, other than himself. It is entirely — all I can say, it's clear. I was going to say it's unclear that there is an allegation. It seems to me it's clear that, in fact, there is no allegation here by plaintiff that could establish a long standing and overarching policy of discrimination.

Indeed the theory here seems to be that it is targeted like a laser at Mr. Tenenbaum, in view of circumstances that are peculiar to him. It seems to me that he must be advancing a theory under the first category an ongoing pattern of similar, repeated discriminatory [28] acts.

It is acceptable to point to unauthorized investigations and either attempt or perhaps successful attempt to lower his security clearance or revoke it as being discrete acts, if, which is predicated upon religious affiliation would state a violation under the law.

So the question then becomes, were any one of those discrete acts occurred within the relevant limitations period; in other words, forty-five days before the June 3, 1999 contact with an EEO counselor.

As the court counts the days, that's back to April 19, 1999. As the government alleges, the effects, perhaps, linger on, but there is no indication of any discrete discriminatory acts having occurred since 1998.

The plaintiff's brief in this regard places no assistance to the court to identify specifically any such alleged discrete discriminatory acts. The effect, as Mr. Mateo argued it, as the court noted, and as Mr. Caplan noted as well, the phrasing of counsel is not perhaps dispositive in cases of this kind, but the phrasing may be telling.

Plaintiff continues to suffer the effects, the court noted, and that may be the case. And I feel I don't feel it sincere herein but I'll assume that's the case, but the question

is not whether he continues to feel the [29] effects or suffer the effects or believes that that's the case, but where he points with any, with any specificity to a discrete act within the forty-five day limitation period. He does not.

The materials that are revealed in the course of discovery within the facts of this'case are unavailable to establish any discrete acts the court find. This is not a situation factually similar to the hypothetical that I addressed to Mr. Caplan. Here we have, he knew very well what his belief was with respect to religiously based discrimination.

The fact that discovery in the Bivens action turns up documents that relate to, support for that asserted religious discrimination, it does not constitute singly in itself or collectively in themselves is discrete acts of discriminatory treatment.

He points out, tells Mr. Tenenbaum that he is not allowed contact with his layoffs. He's not allowed to engage in activities he was employed to do. He continues to be a security risk. But accompanying these notations there's not any indication of a specific act on any particular date that would provide the facts necessary to determine when any such discrete act might perhaps have occurred in order to support the continuing violation theory.

[30] Again, it seems to the court that these status notations; that is, the status of being forbidden from contact with certain projects or employees or foreign nationals are, are the effects rather than the acts.

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The court does note that in November of 1999 a Colonel Bishop, I believe it is, wrote requesting a denial of reinstatement of the plaintiff's security clearance. That was November of 1999.

And it seems to me to be about the most nearly proximate to the time that the EEO action commenced. But in any event, it is insufficient under the facts in this case, plaintiff, Tenenbaum, suggests equitable tolling citing Carter versus Rubin, 14 F. Supp. 2d 22, District of Columbia, 1998.

The Carter case held that equitable tolling should apply where the defendant has actively mislead the plaintiff or where the plaintiff has, in some extraordinary way been prevented from asserting his rights.

And Mr. Tenenbaum points to the classified nature of a bunch of material that was either, has been presented in the course of discovery or which has been withheld on the basis of the classified nature of the documentation, and thus has actively mislead the plaintiff, so the theory goes, or as prevented in an extraordinary way from asserting his rights. The court finds that equitable [31] tolling is not an appropriate avenue, however with which to enforce Mr. Tenenbaum's rights in this Title VII complaint.

It is the conclusion of the court that the, that it is Mr. Tenenbaum's failure to timely pursue administrative remedies that has prevented him from moving forward. Equitable tolling does not save the timeliness issue in this regard. The security clearance issue, if the government suggests is not within the justiciable view of the court.

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Mr. Tenenbaum suggests this issue was litigated before Judge Roberts and the opinion of Judge Roberts is appended as an exhibit to plaintiff's presentation here. That was another case in the other, the Bivens case. That has been called Tenenbaum one.

As the defendant notes, however, a portion of Judge Robert's opinion was not included in the, in the plaintiff's presentation and, in which the judge struck the allegations, factual allegations, suggesting that the plaintiffs may be seeking review of the judgment, of the defendant's judgment, on security issues including, for example, the granting of security clearance.

I find nothing in Judge Robert's opinion that's inconsistent with the holding of the United States Supreme Court in the Department of Navy versus Egan, 484 U.S. 518, 1998.

[32] The court held the Merit System Protection Board was without authority to review the complaint of underlying decision to deny or revoke the security clearance.

National security concerns prevented the board from reviewing and differing with or doing anything with the decision on those security grounds, decisions made within the discretion of the executive branch.

The Egan court said the courts have been traditionally reluctant to intrude on the authority, I'm sorry, in military and national security affairs. That's Egan 484 U.S. at 530. The court's addressing related security issues that responded similarly and accordingly.

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For example Perez versus FBI, 71 F.3d 513, Fifth Circuit, 1995, which denied judicial review under Title VII where the view would have necessarily required some judicial scrutiny of the merits of a decision to revoke a security clearance. Brazil versus Navy, 66 F.3d 193, Ninth Circuit, 1995, holding that the district court lacked jurisdiction to review a decision to revoke security clearance in the context of a Title VII discrimination action.

And similarly, Beattie versus Boeing, 43 F.3d 559, Tenth Circuit, 1994, which concluded that the court could not review national security clearance decision, [33] either by the government contract or by the contracting agency, a Bivens action was accordingly precluded. Judicial review is, in fact, precluded if the court would be required to review the substance of a security clearance determination resulting in any claim in the lawsuit.

Guillot, G-u-i-l-l-o-t, versus Garrett, 970 F.2d 1320, Fourth Circuit, 1992, which held that the court was without, "without authority to review the Navy's denial of SCI clearance to appellant even in the face of his claim of handicap discrimination".

And several other cases, Peterson versus Department of Navy, 787 F. Supp. 713, and Becerra, B-e-c-e-r-r-a, versus Dalton, 94 F.3d 145, in accord plaintiff cites no authority.

The government seems to ask, however, that the court simply strike the paragraphs in the complaint, suggesting that the propriety of the security clearance is at issue here. Paragraph 45, paragraph 47, 46, I think, as well, para-

graph 56. It seems to the court by striking paragraph 47 the court will eliminate the allegation that a discriminatory act occurred on November 10, 1999.

And that's the only allegation of continuing violation by which Mr. Tenenbaum's complaint could be brought within the period of limitations, that is within the forty-five day period of limitations.

[34] The government's point is well taken. In this regard the court finds in terms of the security clearance non-justiciability. Those paragraphs, indeed, cannot be considered by the court. And as that was the final read upon which, or to which the complaint may have been clinging for a specific discrete act within the forty-five day period, the entire case in that regard must be, and is to be dismissed.

Title VII claims are barred in their entirety. I find further that Mr. Tenenbaum has not been actively mislead nor otherwise prejudiced in an extraordinary manner such that equitable tolling could legitimately apply to save his failure to act in a timely matter as required by the law.

The motion is dismissed. And a short form order will issue in accordance with that. With that order earlier, of course, at the commencement of this action at the commencement of this here, Madeleine Tenenbaum is dismissed as a plaintiff by concession of counsel. Thank you for your briefing. Thank you for your argument, counsel.

APPENDIX D — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DATED APRIL 29, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No: 98-74473
Honorable Victoria A. Roberts

DAVID AARON TENENBAUM, AND MADELINE GAIL TENENBAUM,

Plaintiffs,

vs

LT. COL. JOHN SIMENINNI; ALBERT D. SNYDER; JACK PARKS; ED JACKOVICH; MARK P. YOURCHOCK, ROBERT M. RILEY, Individually and in their capacities as Employees for the Various Federal Agencies that Employ them; and the UNITED STATES OF AMERICA,

Defendants.

OPINION AND ORDER GRANTING IN PART, AND DENYING IN PART, DEFENDANTS' MOTION TO DISMISS

Appendix D

I. INTRODUCTION

The present litigation arises out of allegations that the Department of Defense Investigative Service (DIS) attempted to falsely accuse David Aaron Tenenbaum of espionage. In short, Tenenbaum claims that he was forced to take a polygraph examination, that DIS agents subsequently fabricated his confession to obtain a search warrant, that his home and office were illegally searched, and that thereafter he was under such constant surveillance that he was forced into hiding. Tenenbaum and his wife allege violations of the First, Fourth and Fifth Amendments and various state law claims. Defendants now move to dismiss on a number of grounds. For the reasons explained below, the Court denies the motion in part and grants it in part.

II. STATEMENT OF FACTS[1]

David Aaron Tenenbaum ("Plaintiff")[2] is a devout orthodox Jew who has been employed by the United States Army Tank

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1. The facts as set out below are derived from Plaintiffs' proposed Second Amended Complaint, attached as Exhibit A to their Brief in Response to Defendants' Motion. The Court acknowledges that this Complaint has not yet been filed. Nonetheless, the parties and the Court have agreed to allow it, and counsel for Defendants asserted at oral argument that their Motion is equally applicable to the proposed Second Amended Complaint.

2. There are two plaintiffs in this lawsuit, David Aaron Tenenbaum and his wife, Madeline Gail Tenenbaum. However, since the substance of this Motion involves only incidents involving David Araon Tenenbaum, "Plaintiff" refers to him and not his wife.

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Automotive Armaments Command ("TACOM") as an engineer since 1984. He worked at the Research Development and Engineering Center at TACOM, and was last assigned to the Combat Vehicle Team. Because he had lived in Israel and spoke fluent Hebrew, Plaintiff was hired, in large part, to develop international survivability programs with the Israelis. Plaintiff worked closely with the Israelis and made two trips to Israel for his work in 1985 and 1986. His religious convictions were allegedly well known to his superiors; he often spoke in Hebrew, would not eat at non-Kosher restaurants, and wore a yarmulke.

Plaintiff claims that he was a highly productive and conscientious employee throughout his tenure. He asserts that despite this, Defendant Lt. Col. Simeninni ("Simeninni") denied him participation in an engineer exchange program after he had been chosen by a higher ranking government official for the position. Simeninni allegedly stated that he "didn't trust Tenenbaum, or the Israelis." Simeninni also allegedly accused Plaintiff of not cooperating with security personnel and threatened to revoke his security clearance. In late 1996, security personnel in Simeninni's office prohibited Plaintiff from traveling to Israel.

Also in late 1996, the Department of Defense requested a security investigation, ostensibly to determine whether Plaintiff could be cleared for access to Special Access Programs and Top Secret Information. In January 1997, Plaintiff participated in an interview with respect to this potential upgrade. Plaintiff believes the interview was a hoax because he had already been labeled a suspect in an espionage investigation. He claims that he and other Jews were targeted

by the U.S. Government pursuant to U.S. discriminatory counter-intelligence policy which targeted Jews employed by U.S. Government agencies.

At the interview, Plaintiff was introduced to DIS agents Defendant Mark Yourchock ("Yourchock") and Defendant Robert Riley ("Riley"). Yourchock and Riley allegedly identified themselves as "special agents" and produced badges and business cards. Plaintiff believed that they were law enforcement officials who had the power to arrest him and that they carried guns.

During the interview, Plaintiff was allegedly accused of passing classified information to the Israeli government, and of using his home illicitly to meet with foreign intelligence officers. Plaintiff protested that he rarely dealt with classified information, and that he socially entertained foreign nationals at his home with the knowledge of his superiors. Riley and Yourchock allegedly told Plaintiff that if he did not submit to a polygraph, he would be admitting guilt and would be fired. They also told him he should resign.

At a follow-up meeting, Plaintiff was officially advised that he was under investigation for espionage. He was again advised that if he refused a polygraph exam it would be considered an admission of guilt and he would lose his job. This threat was made despite Defendants' alleged awareness that polygraph tests on matters of espionage have no validity. Plaintiff claims that he consented to the polygraph upon coercion. He also claims that he requested to tape record it, but that was denied.

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Defendant DIS agent Albert Snyder ("Snyder") administered the polygraph test. Snyder allegedly told Plaintiff that he had "done other Jews before," including one Jew who married an Israeli. He claimed to have gotten other Jews to confess, even though in some cases it took months, and said that he would get Plaintiff to confess no matter how long it took. He also said he was involved in the Jonathan Pollard case.[3] Snyder allegedly called Plaintiff a liar and said he could tell Plaintiff was a spy just by looking into his eyes. He told Plaintiff that if he confessed, he would only suffer a slap on the wrist. After taking the polygraph, Plaintiff was allegedly asked to write out a confession, but he refused.

The following day, Plaintiff returned to work to find that his computer had been confiscated. He claims that a "cadre of agents, presumably from the FBI and DIS" stripped him of the badge and sticker which allowed him access to his work site, and that he was suspended.

Meanwhile, Snyder conveyed to FBI Agent Sean Nichol information that was later reduced to a sworn affidavit by Nichol. The affidavit stated, in relevant part, that Tennenbaum consented to a polygraph, that he confessed to taking and divulging classified information to every Israeli Liaison Officer assigned to TACOM over the previous ten years, and that he admitted having taken TACOM computers to his home. According to Plaintiff, the contents of the affidavit were completely false. Soon after, a search warrant was issued.

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3. Jonathan Pollard is a Jewish former navy intelligence officer who is serving a life sentence for his conviction of spying for Israel.

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On Saturday, February 15, 1997, FBI and possibly other agencies searched Plaintiffs' home for hours. A few days later, Simeninni allegedly informed the U.S. Army Control Personnel Security Clearance Facility ("CCF") that Plaintiff had violated the security procedures, failed to report foreign contacts, and passed on classified information. Simeninni requested revocation of Plaintiff's security clearance.

After the search, information was leaked to the media indicating that classified information had been found in various locations of Plaintiffs' home, including his baby's bedroom, the laundry room and under the basement steps. Plaintiff was allegedly vilified in the media despite the fact that no classified information was present or seized from his home. In addition, agents from various government agencies began an intense 24-hour surveillance of his home and neighborhood. For three to four months agents allegedly threatened and harassed Plaintiff's neighbors and family. At one point during the surveillance, Plaintiff was nearly run over by a surveillance vehicle. According to Plaintiff, he feared for his life and for the lives of his family members because he had been labeled a spy and traitor, and he was forced to go into hiding. His family was also terrified.

Nearly a year after the investigation had begun, Plaintiff was informed that the FBI concluded that he had not violated the espionage laws. Nonetheless, before closing the case, the local U.S. Attorney's office was asked by persons Plaintiff believes are DIS agents to investigate Plaintiff for making false statements to the DIS agents. Despite this request, the AUSA assigned to the case wrote to the FBI declining to take the case to a grand jury in February 1997. The AUSA

stated that "there is no question that if evidence existed that would prove this case, then these agents would have found it."

Plaintiff was then asked to return to work, and he has been working since March 1998.

III. STANDARD OF REVIEW

A. 12 (b)(6) Motions to Dismiss

Rule 12(b)(6) provides that

> [e]very defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses at the option of the pleader may be made by motion: (6) failure to state a claim upon which relief may be granted.

The Sixth Circuit has often discussed how a trial court is to review a Rule 12(b)(6) motion. It states that a trial court "must construe the complaint liberally in the plaintiff's favor and accept as true all factual allegations and permissible inferences therein." *Gazette v. City of Pontiac*, 41 F.3d 1061, 1064 (6th Cir. 1994); *see also Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995). Because a Rule 12(b)(6) motion rests upon the pleadings rather than the evidence, "[i]t is not the function of the court [in ruling on such a motion] to weigh evidence or evaluate the credibility of the witnesses." *Miller*, 50 F.3d at 377. The court should deny a Rule 12(b)(6) motion "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle

[her] to relief."-*Gazette*, 41 F.3d at 1064; *see also Miller*, 50 F.3d at 377; *Vemco. Inc. v. Camardella*, 23 F.3d 129, 132 (6th Cir. 1994). In addition, where matters outside the pleading are presented to and not excluded by the court, Rule 12(b)(6) mandates that the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to a Rule 56 motion.

B. 12(b)(1) Motions for Lack of Jurisdiction

Rule 12 (b)(1) allows for motions asserting lack of jurisdiction over the subject matter. Fed. R. Civ. P. 12 (b)(1). In a 12(b)(1) motion, the court need not construe the allegations in the non-moving party's favor because the burden of proving jurisdiction is on the party asserting it. Moreover, it is recognized that a party faced with a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) may not rest on the truth of the facts asserted in its pleadings. *See Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir.1990) ("[When a court reviews a complaint under a factual attack [on jurisdiction], . . . no presumptive truthfulness applies to the factual allegations."); *Exchange Nat'l Bank of Chicago v. Touche Ross & Co.*, 544 F.2d 1126, 1131 (2d Cir.1976) (Friendly, J.) ("[A] party opposing a Rule 12(b)(1) motion cannot rest on the mere assertion that factual issues may exist."); *see also Ohio Nat'l Life Ins.*, 922 F.2d at 324 (noting that plaintiff has burden of proving jurisdiction). Indeed, in *Cook v. Providence Hosp.*, 820 F.2d 176, 178 (6th Cir. 1987), the Sixth Circuit observed that a court should treat a Rule 12(b)(1) motion that is filed with a supporting affidavit as it would a motion for summary judgment.

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IV. DISCUSSION

Defendants contend that Plaintiffs' Complaint must be dismissed in its entirety pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6). Defendants make several arguments in support of their Motion, and the Court addresses those arguments below in the order they are presented in Defendants' Brief.

A. Title VII Pre-emption

Defendants first claim that Plaintiffs' discrimination claims are pre-empted by Title VII, such that Plaintiffs must first pursue their administrative remedies. Defendants also point out that under Title VII, the proper Defendant is the Secretary of the Army. 42 U.S.C. 2000e-16(c). Plaintiffs agree that Title VII is the exclusive remedy for federal employment discrimination, and the proposed Second Amended Complaint therefore drops their Elliot Larsen Civil Rights claim. However, the parties continue to dispute the extent to which Plaintiffs' remaining Constitutional and state law claims are still cognizable. According to Defendants, Plaintiffs' proposed Second Amended Complaint still contains several allegations of discrimination and is, therefore, largely pre-empted. According to Plaintiffs, the federal courts' power to grant relief for violations of the Constitution is firmly established, and the fact that David Tenebaum is a federal employee does not mean he has waived his Constitutional rights.

Upon review, the Court finds that both parties are partly correct. In *Brown v. General Services Administration*, 425 U.S. 820 (1976), the Supreme Court clearly held that

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Congress intended Title VII to pre-empt the availability of other discrimination remedies for federal employees. Relying on *Brown*, courts often dismiss Constitutional or other federal claims. *See e.g.*, *Clement v. Motta*, 820 F. Supp. 1035 (W.D. Mich. 1991). At the same time, the Supreme Court and lower courts have frequently allowed plaintiffs to pursue claims directly under the Constitution or other federal law, and the Court's authority to provide remedies for such violations is unquestioned. *See e.g.*, *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

The distinction between these two lines of cases lies in the extent to which the plaintiff's claims are cognizable as discrimination claims. In *Flanagan v. Reno*, 8 F. Supp.2d 1049 (N.D. Ill. 1998), the court allowed the plaintiff to pursue a federal privacy act claim with a discrimination claim because it found that "a privacy violation is not necessarily discriminatory." *Flanagan*, 8 F. Supp.2d at 1052. Meanwhile, the court in *Clement v. Motta*, 820 F. Supp. 1035 (W.D. Mich. 1991) dismissed the plaintiff's retaliation and conspiracy claims because it was clear that the gravamen of his claim was discrimination.

Davis v. Passman, 442 U.S. 228 (1979), relied on by Plaintiffs, is not to the contrary. In *Davis*, the Supreme Court allowed a federal employee to bring a discrimination claim directly under the Constitution, but only because the plaintiff was not covered under Title VII and therefore had no remedy under the statute. 442 U.S. at 247. In so doing, the Court clarified that Title VII is the exclusive remedy for federal employees covered by the statute. *Id.* at 247 n.26. Thus, the

central question before this Court is which, if any, of Plaintiffs' remaining claims are still discrimination claims, and which raise constitutional violations that are not necessarily discriminatory.[4]

Turning to Plaintiffs' proposed Second Amended Complaint, the Court concludes that Count III, Plaintiffs' claim for Conspiracy to Violate the First and Fifth Amendments, is preempted. Count III asserts a conspiracy to violate Plaintiffs' religious and due process rights based on "improper discriminatory animus." These are the types of Constitutional claims for discrimination that the Supreme Court has found should be brought under Title VII. Accordingly, they must be dismissed. Moreover, because several of Plaintiffs' allegations form the basis of his discrimination claim, they must be stricken as well. Specifically, paragraph 21 (alleging that Simeninni denied Plaintiff participation in a program because he didn't trust Israelis); part of paragraph 22 (relating to Plaintiff's concerns about Simeninni's motives); paragraph 26 (that the United States Government had a discriminatory counter-intelligence policy targeting Jews); and most of paragraph 34 (from where Defendant Snyder said he had "done other Jews before" and up where Plaintiff refused to write out a confession). To the extent that Plaintiffs wish to pursue the claims and allegations referred to, they must name the Secretary of Defense as the defendant, 42 U.S.C. 2000e-16(c), and exhaust their administrative remedies.

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4. Plaintiffs also rely on *Webster v. Doe*, 486 U.S. 592 (1983). However, Title VII preemption was not an issue in that case. Therefore, it is inapposite.

While Defendants claim that virtually all the other claims are also discrimination claims because they arose in the context of Plaintiff's employment, the Court disagrees. Contrary to Defendants' position, the remaining claims are not necessarily discrimination claims. The alleged unreasonable searches and seizures, the false arrest/imprisonment, and the libel and slander claims do not require a showing of discrimination in order for Plaintiffs to recover. In fact, Defendants' intent with respect to those claims is irrelevant to such claims. Plaintiffs' reference to Defendants' anti-Jewish animus as the cause of these other harms has no bearing on whether in fact the alleged violations occurred. As such, these claims are independent of the discrimination claims and are not pre-empted. Accordingly, Defendants' Motion is granted only with respect to Count III of Plaintiffs' Second Amended Complaint.

B. The Westfall Act and Federal Tort Claims Act Exemptions

Defendants claim that all tort claims against the individuals should be dismissed and the United States should be substituted as Defendant. Defendants further argue that, upon substituting the United States, any torts excluded under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(h), must be dismissed. Plaintiffs contest whether the United States should be substituted and to what extent the exclusions apply; they request discovery.

The Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. § 2679 ("the Westfall Act"), permits the United States to be substituted in a civil

action for money damages brought against a federal employee who is alleged to have committed a common law tort while acting within the scope of his employment. *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1143 (6th Cir. 1996). The Westfall Act is the exclusive remedy for injuries to persons or property caused by the tortious acts of federal employees acting within the scope of their employment. *Arbour v. Jenkins*, 903 F.2d 416, 420 (6 Cir. 1990). It provides that "upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose . . . the United States shall be substituted as a party defendant." 28 U.S.C. 2679(d)(1). The Attorney General has delegated to the United States Attorney the authority to provide § 2679 certification, and such certification is prima facie evidence that the employee was acting within the scope of employment. *RMI* 78 F.2d at 1143. However, the issue is a question of law for the Court, to be decided in accordance with the law of the state where the conduct occurred. *Arbour*, 903 F.2d at 421-22.

Under Michigan law, the determinative question is whether the employee's actions are within his authority. *Leitch v. Switchenko*, 169 Mich. App. 761, 765-66 (1988); *Burch v. A&G Assoc. Inc.*, 122 Mich. App. 798, 804 (1983). It is well-established that "an employee may be within the scope of his employment even though, at the same time, he is doing something to serve a purpose of his own." *Bajdek v. Toren*, 382 Mich. 151 (1969). However, it is equally well-established that an employee who takes a tortious action purely for personal gain or animosity, rather than to help the employer, is not acting within the scope of his authority.

Mair v. C. & O. R.R., 851 F.2d 829, 834 (6th Cir. 1988); *Renda v. International Union*, 366 Mich. 58, 95-6 (1962).

Here, Plaintiffs contend that Defendants were not acting within their authority and request discovery on the issue. Plaintiffs point out that Defendants now claim to lack authority to conduct searches or seize evidence, yet in another proceeding Thomas J. O' Connor, an agent from DIS testified that they do have such power.[5] Further, Plaintiffs claim that Defendants conducted themselves as if they did have the power to conduct searches and seize evidence even if they did not have such authority. Thus, Plaintiffs claim that there is some question regarding the exact scope of Defendants' authority, and they should be afforded the opportunity to investigate that issue.

The scope of discovery is within the discretion of the district court, *RMI*, 78 F.3d at 1143, and the Court will permit it. Unlike *RMI*, 78 F.3d at 1143, relied on by Defendants, this is not a case where the plaintiff has not already had more than a year to come forward with evidence contesting the Attorney General's certification and has failed to do so. Nor is this a case like *Henson v. National Aeronautics and Space Administration*, 14 F.3d 1143, 1148 (6th Cir. 1004), where discovery is not needed because all of Defendants' alleged actions were necessarily within the scope of their employment. C.F.R. Part 377.4 indicates that the DIS is a "law enforcement, personnel security investigative" agency. However, Plaintiff's

5. *But see* Affidavit of Jay P. Fraude, Attachment to Reply Brief, indicating that Defendants are not Defense Criminal Investigative Service ("DCIS") officers and therefore lacked authority to conduct searches or seize evidence.

allegations raise some questions about the scope of Defendants' authority in conducting the investigations. In particular, it is questionable whether DIS officers have the authority to falsely swear out, or assist in swearing out, affidavits for search warrants.

Moreover, discovery is warranted due to the importance of the issue. If Defendants were acting within the scope of their employment and are not law enforcement officers, not only will the United States be substituted under the Westfall Act, but Plaintiff's claims for false arrest/imprisonment, as well as their claims for libel/slander will be dismissed. The FTCA, 28 U.S.C. § 1346(b) waives the immunity of the United States for many torts, but not all. *See* 28 U.S.C. § 2680(h). Claims of false arrest/imprisonment are excluded under the FTCA unless conducted by a law enforcement officer, while claims for libel and slander are absolutely precluded. *Id.* As such, if the United States is substituted, Plaintiff will be without a remedy for his claims of libel, slander and false arrest/imprisonment.[6] Thus, the Court grants discovery to determine whether and to what extent each Defendant was acting within the scope of his employment during the various time periods at issue in the complaint. Accordingly, the Court denies the second and third basis of Defendants' Motion.

C. Jurisdiction Over Security Clearance Decisions

Defendants next contend that the Court lacks jurisdiction to review the substance of the DIS security clearance

6. Plaintiff cannot continue to pursue exempted claims against the individual. *Henson*, 14 F.3d at 1148.

investigation. While the question has apparently not been addressed in the Sixth Circuit, it is clear that several other circuits have relied on *NM v. Egan*, 484 U.S. 518 (1988), to preclude judicial review of the substance of security clearance determinations. In *Egan*, the Supreme Court noted that judgment regarding security decisions must be committed to the broad discretion of the responsible agency, and that such decisions are best left in the hands of "those with the necessary expertise," rather than "an outside non-expert body." 484 U.S. at 529. The Fourth Circuit has relied on *Egan* to preclude claims of discriminatory security clearance revocations as well as claims of retaliatory initiation of security investigations. *Guillot v. Garret*, 970 F.2d 1320 (4th Cir. 1992); *Becerra v. Dalton*, 94 F.3d 145, 148 (4th Cir. 1996). Similarly, both the Fifth and Ninth Circuits have rejected Title VII claims where such claims would require the court to examine the legitimacy of the reasons for revoking the plaintiffs' security clearance. *Perez v. FBI*, 71 F.3d 513 (5th Cir. 1995); *Brazil v. Navy*, 66 F.3d 193 (9th Cir. 1995). Following the reasoning of the circuit courts cited, this Court also concludes that it lacks jurisdiction to review Defendants' reasons for investigating Plaintiff as a potential security risk, as well as their reason for requesting revocation of Plaintiff's security clearance. The Court finds that such scrutiny would be an impermissible judicial intrusion into the authority of the Executive Branch over matters of national security under *Egan*. *See* 484 U.S. at 529-30.

While the Court agrees that it cannot review the substance of Defendants' decisions, it declines to read *Egan* as broadly as Defendants suggest. Defendants assert that all claims arising out of paragraphs 24-48 of the proposed Second

Amended Complaint[7] are barred, which appears to include all counts with the exception of the claim for assault and battery, and the loss of consortium claim. As such, Defendants would have this Court not only decline jurisdiction over the substance of the security decisions, but also over all Defendants' conduct in the course of gathering information relevant to that decision.

The Court finds that Defendants' position represents an exception that would swallow the rule. Taken to its logical end, Defendants would be immune not just from review of their decisions, but from review of any actions arguably related to the investigation underlying that decision. In essence, Defendants attempt to escape potential liability for their actions by seeking refuge in their power to make national security decisions. The law, however, does not and should not go that far, and Defendants appear to recognize this: the fact that they sought a search warrant from a federal judge is itself evidence that even they did not believe that they were so immune.[8] Thus, while the Court defers to Defen-

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7. Defendants rely primarily on the allegations in the First Amended Complaint. However, the Court relies on the similar allegations in the proposed Second Amended Complaint.

8. *Webster v. Doe*, 486 U.S. 592 (1988) also suggests that the Court's jurisdiction is not as limited as Defendants claim. In *Doe*, the Supreme Court held that while the decision of the Director of the Central Intelligence Agency to discharge an employee was not reviewable under the Administrative Procedure Act, the employees constitutional claims were reviewable. In so doing, the Court in *Doe* rejected the claim that review of such claims would entail excessive involvement in national security affairs. 486 U.S. at 604. The Court

(Cont'd)

dants' judgment, it need not sit idly by where they allegedly violate the law in gathering the facts relevant to that judgment.

Applying *Egan* to Plaintiffs' proposed Second Amended Complaint, the Court finds that none of the specific counts in the Complaint require a review of Defendants' judgment. Rather, these claims properly seek review of Defendants' conduct in the course of and subsequent to the revocation of his clearance. Whether or not Defendants committed the various violations asserted under those counts is properly reviewable.

That being said, however, the Court finds that several of the factual allegations that suggest Plaintiffs may be seeking review of Defendants' judgment on security issues. In particular, the assertions in paragraphs 21 (Simenneni denied Plaintiff participation in an engineer exchange program because he didn't trust him); paragraph 23 (Plaintiff denied clearance to travel to Israel); paragraph 27-28 (accusations that Plaintiff passed classified information to Israelis and his denial of same); paragraph 35 (Plaintiff was stripped of his badge and sticker upon returning to work after the polygraph); and paragraph 48 (Simenneni's requested revocation of Plaintiff's security clearance after the search). Because these assertions suggest that Plaintiffs' are seeking review of the merits or validity of Defendants' security decisions, they must be stricken. Accordingly, Defendants' fourth argument is rejected with respect to the counts in the Complaint, but accepted with respect to certain allegations.

(Cont'd)

noted that the District Court has the latitude to control discovery and to balance the plaintiff's need for access to proof against the government's need for confidentiality. *Id.*

Appendix D

D. § 1983 Claims

Defendants assert that Plaintiffs' 42 U.S.C. § 1983 claims should be dismissed because Defendants acted under color of federal law, not state law. Plaintiffs' stipulated to this issue at oral argument. Accordingly, the § 1983 claims will be dismissed.

E. Constitutional Torts Against the United States & Officials

Defendants argue that constitutional claims against the United States are barred by sovereign immunity, as are constitutional claims against federal employees in their official capacities. Plaintiffs contend that Defendants may be sued in their official capacities under *Bivens*, 403 U.S. 388.

It is well settled that the United States is subject to suit only to the extent it has consented to be sued. *United States v. Testan*, 424 U.S. 392, 399 (1976). To date, it has not consented to suit for constitutional claims. *Ashbrook v. Block*, 917 F.2d 918, 924 (6th Cir. 1990) (citing *Jaffee v. United States*, 592 F.2d 712, 717 (3d Cir. 1979) for the proposition that a *Bivens* action may be brought against government officials, not the government itself)). Moreover, it is well settled that the bar of sovereign immunity cannot be avoided simply by naming officers and employees of the United States in their official capacities. *Ecclesiastical Order v. Chasin*, 845 F.2d 113, 115-16 (6th Cir. 1988). Rather, federal officials may be sued only in their individual capacities for violation of a plaintiffs constitutional rights. *See id.* at 116 (citing *Davis*, 442 U.S. 228 and *Bivens*, 403 U.S. 388). Plaintiffs'

assertion to the contrary is therefore misplaced. Accordingly, Plaintiffs' claims for constitutional violations against the United States and against the other Defendants in their official capacities must be dismissed.

F. Conspiracy Claims

Defendants argue that Plaintiffs' constitutional conspiracy claims should be dismissed because their Complaint does not include sufficient factual specificity to state a claim.[9] Plaintiffs respond that the facts as pled demonstrate an evil agreement motivated by anti-semitism as well as the overt acts committed by the Defendants.

Regardless of whether the factual allegations are sufficient, Plaintiffs' constitutional conspiracy claims will be dismissed. In order to state a claim under 1985(3), a plaintiff must show there is some racial or otherwise class-based invidiously discriminatory animus behind the defendants' actions. *Maki v. Laako*, 88 F.3d 361, 367 (6th Cir. 1996) (citation omitted). As such, these claims are discrimination claims and are, therefore, pre-empted by Title VII. To the extent that these claims were not disposed of under the Court's ruling on Title VII pre-emption, *see* IV A *supra*, they are hereby dismissed.

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9. Defendants' Brief addresses only the conspiracy claims brought under 1983(5). As such, the sufficiency of Plaintiffs' state conspiracy claims are not at issue.

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G. Qualified Immunity

Defendants' final argument is that Plaintiffs' constitutional claims must be dismissed because they have failed to plead specific facts in avoidance of qualified immunity for each Defendant. Plaintiffs assert that their detailed factual allegations adequately demonstrate that qualified immunity is not warranted.

It is well established that government officials are entitled to immunity so long as their conduct does not violate clearly established rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Qualified immunity is appropriate either on the basis that the right allegedly violated was not at the time "clearly established," or if "clearly established," was one that a "reasonable" person in the defendant's position could have failed to appreciate would be violated by his conduct. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."). The exact action in question need not have been previously held unlawful, but its unlawfulness must be apparent in light of pre-existing law. *Id.* The standard is one of objective reasonableness, analyzing claims of immunity on a fact-specific, case-by-case basis to determine whether a reasonable official in the defendants' position could have believed that his conduct was lawful, in light of clearly established law and the information he possessed. *Id.*; *Adams v. Metiva*, 31 F.3d 375, 386 (6th Cir. 1994).

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When a qualified immunity challenge is made to a complaint, the plaintiff must plead facts or allegations that show both a violation of his rights and that the rights were so clearly established that any official in the defendant's position at the time, measured objectively, would have clearly understood that he was under an affirmative duty to refrain from the conduct. *Dominque v. Telb*, 831 F.2d 673, 676 (6th Cir. 1987). The plaintiff must respond with "specific, non-conclusory allegations of fact that will enable the district court to determine that those facts, if proved, will overcome the defense of qualified immunity." *Veney v. Hogan*; 70 F.3d 917, 922 (6th Cir. 1995); *Cameron v. Seitz*, 38 F.3d 264, 273 n.2 (6th Cir. 1994). If this pleading burden is not carried by the plaintiff, dismissal is proper. *Id.*

Upon review of Plaintiffs' proposed Second Amended Complaint, the Court finds that the allegations sufficiently demonstrate a possible violation of the Fourth Amendment and that any official in the Defendants' position would have known that their conduct was unconstitutional. Clearly, it was clearly established it was that, except in certain well-defined circumstances, a search or seizure is unreasonable unless it is accomplished pursuant to a valid judicial warrant issued upon probable cause. *Skinner v. Railway Labor Executives Board*, 489 U.S. 602, 619 (1989); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 219; *United States v. Kelly*, 913 F.2d 261, 265 (6th Cir. 1990). Likewise, it was well settled that a search pursuant to a warrant is invalid where the issuing magistrate was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. *United States v. Leon*, 468 U.S. 897, 922 (1984); *United*

States v. Weaver, 99 F.3d 1372, 1380 (6th Cir. 1996). Plaintiffs' proposed Second Amended Complaint alleges that Snyder and possibly other DIS agents fabricated his confession and used it in an affidavit for a search warrant.[10] No reasonable officer could think that such an action comported with the Fourth Amendment. Thus, Plaintiffs' specific non-conclusory allegations, if proven, will overcome the defense of qualified immunity. Accordingly, Snyder and any other agents involved are not entitled to qualified immunity.

While Plaintiffs' allegations with regard to Defendants other than Snyder are less specific, the Court finds that the allegations sufficiently demonstrate that those Defendants may also have been involved in the alleged fabrication. As such, discovery with respect to the role of each of those Defendants in the alleged Fourth Amendment violation is warranted. Qualified immunity is denied with respect to those Defendants, subject to reconsideration at the summary judgment stage.

V. CONCLUSION

In sum, the Court grants in part and denies in part Defendants' Motion to Dismiss. Defendants' Motion is granted with respect to the pre-empted discrimination claims asserted in Count III, as well as any other § 1985(3) claims.

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10. It further alleges that Defendants' oppressive and malicious conduct violated Plaintiffs' Fifth Amendment Due Process rights. However, Plaintiffs' Brief does not address this claim and fails to show that how the contours of such a right were sufficiently established such that Defendants' actions clearly violated that right. Accordingly, immunity on that claim is conceded.

In addition, Plaintiffs' § 1983 claims are dismissed, as Defendants acted under federal, not state, law. Finally, any claims for Constitutional violations that Plaintiffs intended to pursue against the United States or against the other Defendants in their official capacities are dismissed as barred by sovereign immunity.

Whether the United States should be substituted as a named Defendant under the Westfall Act, and to what extent Plaintiffs' claims are excluded under the FTCA will await discovery on the issue of whether Defendants were acting within the scope of their employment. In addition, the Court concludes that it has jurisdiction to review the actions of Defendants in the course of their investigation, although it will not review the substance of their decisions. Finally, the Court will deny Defendants' claim of qualified immunity, subject to further review of at the summary judgment stage.

IT IS SO ORDERED.

s/ Victoria A. Roberts
HON. VICTORIA A. ROBERTS
UNITED STATES DISTRICT JUDGE

dated: APR 29 1999

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING AND REHEARING EN BANC DATED AND FILED DECEMBER 11, 2002

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 00-2394/01-1704

DAVID AARON TENENBAUM,

Plaintiff-Appellant,

v.

LOUIS CALDERA,

Defendant-Appellee.

ORDER

BEFORE: KENNEDY, SUHRHEINRICH, and BATCHELDER, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

Appendix E

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX F — CONSTITUTIONAL, STATUTORY, REGULATORY AND EXECUTIVE ORDERS INVOLVED

* * *

Amendment V

No person shall be deprived of life, liberty, or property, without due process of law.

* * * *

Appendix F

42 U.S.C.S. § 2000e-16

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21. CIVIL RIGHTS
EQUAL EMPLOYMENT OPPORTUNITIES

42 USCS. § 2000e-16 (2003)

§ 2000e-16. Nondiscrimination in Federal Government employment

(a) Discrimination prohibited. All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

* * *

Appendix F

(e) Continuing responsibility of agencies and officials to assure nondiscrimination. Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

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42 U.S.C.S. § 2000e-2

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21. CIVIL RIGHTS
EQUAL EMPLOYMENT OPPORTUNITIES

42 USCS § 2000e-2 (2003)

§ 2000e-2. Unlawful employment practices

* * *

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices. Except as otherwise provided in this title [42 USCS §§ 2000e et seq.], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

* * * *

Appendix F

5 U.S.C.S. § 7201

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART III. EMPLOYEES
SUBPART F. LABOR-MANAGEMENT AND EMPLOYEE RELATIONS
CHAPTER 72. ANTIDISCRIMINATION; RIGHT TO PETITION CONGRESS
SUBCHAPTER I. ANTIDISCRIMINATION IN EMPLOYMENT

5 USCS § 7201 (2003)

§ 7201. Antidiscrimination policy; minority recruitment program

* * *

(b) It is the policy of the United States to insure equal employment opportunities for employees without discrimination because of race, color, religion, sex, or national origin. The President shall use his existing authority to carry out this policy.

* * * *

Appendix F

29 C.F.R. § 1614.105

TITLE 29—LABOR

COMMISSION

PART 1614—FEDERAL SECTOR EQUAL EMPLOYMENT OPPORTUNITY—Table of Contents

Subpart A—Agency Program To Promote Equal Employment Opportunity

Sec. 1614.**105** Pre-complaint processing.

(a) Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age or handicap must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.

(1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.

(2) The agency or the Commission shall extend the 45-day time limit in paragraph (a)(1) of this section when the individual shows that he or she was not

notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have been known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

* * * *

Appendix F

5 C.F.R. § 2635.101

TITLE 5—ADMINISTRATIVE PERSONNEL

CHAPTER XVI—OFFICE OF GOVERNMENT ETHICS

PART 2635—STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE EXECUTIVE BRANCH—Table

Subpart A—General Provisions

Sec. 2635.**101** Basic obligation of public service.

* * *

(b) General principles. The following general principles apply to every employee and may form the basis for the standards contained in this part. Where a situation is not covered by the standards set forth in this part, employees shall apply the principles set forth in this section in determining whether their conduct is proper.

* * *

(13) Employees shall adhere to all laws and regulations that provide equal opportunity for all Americans regardless of race, color, religion, sex, national origin, age, or handicap.

* * * *

Appendix F

5 C.F.R. § 3601.101

TITLE 5—ADMINISTRATIVE PERSONNEL

CHAPTER XXVI—DEPARTMENT OF DEFENSE

PART 3601—SUPPLEMENTAL STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE DEPARTMENT

Sec. 3601.**101** Purpose.

In accordance with 5 CFR 2635.105, the regulations in this part apply to employees of the Department of Defense (DoD) and supplement the Standards of Ethical Conduct for Employees of the Executive Branch contained in 5 CFR part 2635. DoD employees are required to comply with part 2635, this part, and implementing guidance and procedures.

Appendix F

32 C.F.R. 40.2

TITLE 32—NATIONAL DEFENSE

CHAPTER I—OFFICE OF THE SECRETARY OF DEFENSE

PART 40—STANDARDS OF CONDUCT CROSS-REFERENCES—Table of Contents

Sec. 40.2 Cross-reference to Standards of Ethical Conduct for Employees of the Exec

DoD employees should refer to the Office of Government Ethics (OGE) regulation, Standards of Ethical Conduct for Employees of the Executive Branch, 5 CFR part 2635, and the Department of Defense (DoD) regulation that supplements the OGE regulation, 5 CFR 3601.101, for standards of conduct provisions, including standards for gifts between employees, conflicting financial interests, impartiality in performing official duties, seeking other employment, misuse of position, and outside activities.

Appendix F

46 F.R. § 59941

Title 3 —

The President

United States Intelligence Activities

Executive Order 12333 of December 4, 1981

46 FR 59941

December 8, 1981

* * *

Conduct of Intelligence Activities

2.1 *Need.* Accurate and timely information about the capabilities, intentions and activities of foreign powers, organizations, or persons and their agents is essential to informed decisionmaking in the areas of national defense and foreign relations. Collection of such information is a priority objective and will be pursued in a vigorous, innovative and responsible manner that is consistent with the Constitution and applicable law and respectful of the principles upon which the United States was founded.

* * *

Appendix F

2.8 *Consistency With Other Laws.* Nothing in this Order shall be construed to authorize any activity in violation of the Constitution or statutes of the United States.

* * * *

Appendix F

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release — April 17, 1995

EXECUTIVE ORDER 12958

CLASSIFIED NATIONAL SECURITY INFORMATION

This order prescribes a uniform system for classifying, safeguarding, and declassifying national security information. Our democratic principles require that the American people be informed of the activities of their Government. Also, our Nation's progress depends on the free flow of information. Nevertheless, throughout our history, the national interest has required that certain information be maintained in confidence in order to protect our citizens, our democratic institutions, and our participation within the community of nations. Protecting information critical to our Nation's security remains a priority. In recent years, however, dramatic changes have altered, although not eliminated, the national security threats that we confront. These changes provide a greater opportunity to emphasize our commitment to open Government.

Appendix F

NOW, THEREFORE, by the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

* * *

Sec. 1.8. Classification Prohibitions and Limitations.

(a) In no case shall information be classified in order to:

(1) conceal violations of law, inefficiency, or administrative error;

(2) prevent embarrassment to a person, organization, or agency;

(3) restrain competition; or

(4) prevent or delay the release of information that does not require protection in the interest of national security.

* * * *

Appendix F

EXECUTIVE ORDER 12968

ACCESS TO CLASSIFIED INFORMATION

August 2, 1995

- *Part 1 — Definitions, Access to Classified Information, Financial Disclosure, and Other Items*
- *Part 2 — Access Eligibility Policy and Procedure*
- *Part 3 — Access Eligibility Standards*
- *Part 4 — Investigations for Foreign Government*
- *Part 5 — Review of Access Determinations*
- *Part 6 — Implementation*
- *Part 7 — General Provisions*

The national interest requires that certain information be maintained in confidence through a system of classification in order to protect our citizens, our democratic institutions, and our participation within the community of nations. The unauthorized disclosure of information classified in the national interest can cause irreparable damage to the national security and loss of human life.

Security policies designed to protect classified information must ensure consistent, cost effective, and efficient protection of our Nation's classified information, while providing fair and equitable treatment to those Americans upon whom we rely to guard our national security.

Appendix F

This order establishes a uniform Federal personnel security program for employees who will be considered for initial or continued access to classified information.

NOW, THEREFORE, by the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

* * *

PART 3 ACCESS ELIGIBILITY STANDARDS

Sec. 3.1. *Standards.*

* * *

(c) The United States Government does not discriminate on the basis of race, color, religion, sex, national origin, disability, or sexual orientation in granting access to classified information.

* * * *

Appendix F

ARMY REGULATIONS 60-21

* * *

1-17. Equal employment opportunity

a. There will be no discrimination in employment. The Federal policy against discrimination on the basis of race, religion, color, national origin, sex, age, marital status, political affiliation, mental or physical handicap is applicable to all applicants for employment, as well as to employees of the AAFES.

b. The Commander, AAFES, is authorized to administer Equal Employment Opportunity programs for civilian applicants and employees of the AAFES.

* * * *

Supreme Court, U.S.
FILED
MAY 15 2003
OFFICE OF THE CLERK

No. 02-1353

In the Supreme Court of the United States

DAVID AARON TENENBAUM, PETITIONER

v.

THOMAS E. WHITE, SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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16 pp

QUESTIONS PRESENTED

1. Whether petitioner satisfied the requirement that, before bringing suit against his federal employer under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, he timely contact an Equal Employment Opportunity Counselor.

2. Whether the application of equitable extension doctrines renders petitioner's Title VII claim timely.

3. Whether petitioner's Title VII claim is justiciable to the extent that it challenges decisions by the United States Army to suspend and revoke petitioner's security clearance.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is not published in the *Federal Reporter*, but is reprinted at 45 Fed. Appx. 416. The order of the district court (Pet. App. 12a-13a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 2002. A petition for rehearing was denied on December 11, 2002 (Pet. App. 67a-68a). The petition for writ of certiorari was filed on March 11, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is a civilian employee of the United States Army. He brought suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, alleging that the Army discriminated against him because of his religion. The United States District Court for the Eastern District of Michigan dismissed the suit. Pet. App. 12a-13a. The court of appeals affirmed. *Id.* at 1a-11a.

1. Since 1984, petitioner has been employed by the Army's Tank Automotive Armaments Command (TACOM) as a mechanical engineer. Pet. App. 2a, 44a-45a. Petitioner's assignments have included developing joint projects with the Israeli government. *Id.* at 2a. Petitioner alleges that, in 1992, the Army began to investigate whether he was conducting espionage on behalf of Israel, and that the investigation was initiated because he is an orthodox Jew. *Id.* at 1a-2a. Petitioner claims that in 1997, as part of its investigation, the Army conducted a coercive polygraph examination of him, searched his residence, suspended his security clearance, and placed him on administrative leave. *Id.* at 2a, 45a-48a. The government later terminated its investigation and petitioner returned to work in March 1998. *Id.* at 48a-49a.

Petitioner asserts that since his reinstatement in March 1998, his "working conditions and job assignments have not been commensurate with his GS-13 engineering level and job description." Pet. 4. Specifically, he claims that he is isolated from his co-workers and is not permitted to work on projects with the Israeli government. See Pet. App. 2a-3a. Petitioner's

security clearance, which had been suspended since 1997, was revoked on February 4, 2000. *Id.* at 3a, 48a.[1]

2. In October 1998, petitioner filed suit in the United States District Court for the Eastern District of Michigan against the United States and various federal employees in their individual and representative capacities. The suit alleged violations of the Federal Tort Claims Act and religious discrimination in violation of Michigan law. Pet. 4; Pet. App. 43a. On April 29, 1999, the district court dismissed the religious-discrimination claims because "Title VII is the exclusive remedy for federal employment discrimination." Pet. App. 51a; see *id.* at 53a-54a; *Brown* v. *GSA*, 425 U.S. 820 (1976).

3. As a prerequisite to bringing suit against a federal employer under Title VII, the aggrieved party must contact an agency Equal Employment Opportunity (EEO) counselor within 45 days of the conduct alleged to be discriminatory. The controlling administrative regulation, promulgated by the Equal Employment Opportunity Commission pursuant to express statutory authority, see 42 U.S.C. 2000e-16(b), provides that federal employees "who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age or handicap must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter," and "must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. 1614.105(a).

On June 3, 1999, after his state-law discrimination claims were dismissed, petitioner contacted an Army

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[1] The Army restored petitioner's security clearance in April 2003.

EEO counselor about his religious-discrimination claim. C.A. App. 106. Petitioner later filed a formal EEO complaint, which the Army dismissed on October 27, 1999. *Id.* at 137-141. The Army stated that it was dismissing the complaint because: (1) petitioner failed to provide information relevant to his complaint that the Army had requested, see 29 C.F.R. 1614.107(a)(7); (2) petitioner's EEO contact in June 1999 was not made within 45 days of the alleged discrimination, and petitioner had not established grounds for an extension of the 45-day deadline; and (3) petitioner's claims relating to the suspension of his security clearance were outside the scope of the EEO process. C.A. App. 138-139.

4. On January 19, 2000, petitioner filed this Title VII action against the Secretary of the Army. Pet. 5. On October 19, 2000, after a hearing, see Pet. App. 14a-42a, the district court entered an order granting the government's motion to dismiss, *id.* at 12a-13a. In dismissing the Title VII case, the court determined that petitioner's religious-discrimination claims are time-barred because petitioner failed to initiate an EEO contact within 45 days of the alleged discrimination, and the 45-day period was not equitably tolled. The court further determined that petitioner's claims relating to his security clearance are not justiciable. *Id.* at 34a-42a.

5. The court of appeals treated the district court's decision as a grant of summary judgment for the government, see Pet. App. 11a, and affirmed in an unpublished opinion, *id.* at 1a-11a.

Citing *Department of the Navy* v. *Egan*, 484 U.S. 518 (1988), and decisions of the District of Columbia, Fourth, Fifth, and Ninth Circuits, the court of appeals first determined that "security clearance decisions are not justiciable under Title VII." Pet. App. 3a-4a. The court expressed the view that "[e]xecutive decisions

regarding security clearance are not completely immune from scrutiny," and that judicial review might be available if petitioner had alleged a violation of constitutional rights or administrative regulations. *Id.* at 4a. The court concluded, however, that petitioner had not presented any such potentially justiciable claims. *Ibid.*

The court of appeals also agreed with the district court's conclusion that petitioner's religious-discrimination claims are time-barred. The court rejected petitioner's argument that the so-called "continuing violations doctrine" renders his June 1999 EEO contact timely. The court of appeals recognized that *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101 (2002), "cabined" the application of the continuing violation doctrine, Pet. App. 5a, establishing a limitations rule that is less generous to plaintiffs who allege "serial violations" (*i.e.*, a series of related but discrete violations) than Sixth Circuit precedent had been, *id.* at 5a-6a. But the court deemed it unnecessary to consider *Morgan*'s application to this case, because "even under the old, more liberal [Sixth Circuit] standard," petitioner's claims are barred because he "has not established that a discriminatory act occurred in the limitations period." *Id.* at 7a.

The court explained that, for petitioner's EEO consultation on June 3, 1999, to have been timely, petitioner "would have to show some discriminatory act that occurred on or after April 19, 1999" (*i.e.*, within the 45 days immediately before his first EEO contact). Pet. App. 7a. The district court had determined that petitioner's objections to his conditions of employment after returning to work in March 1998 involved only ongoing effects of the alleged discrimination that occurred before March 1998, not independently actionable discrimination that occurred after April 19, 1999. *Id.* at

35a-38a; see *id.* at 8a. In affirming, the court of appeals concluded that the district court's determination was consistent with the pleadings and record evidence, and, therefore, the "serial violation" theory does not save petitioner's religious-discrimination claims from being time-barred. *Id.* at 8a.

Nor, the court of appeals determined, are petitioner's religious-discrimination claims timely on the theory that petitioner is subject to an ongoing Army policy of targeting American Jews as security risks. Pet. App. 9a. As supposed proof that the Army has an official policy of discriminating against American Jews, petitioner relied in the court of appeals on an article in a Defense Department newsletter, which discussed Israeli intelligence-gathering activities. See *ibid.* The court of appeals agreed with the district court that neither the allegations of petitioner's complaint, nor the newsletter article or any other evidence before the district court, indicated that the Army has such a discriminatory policy. *Ibid.*; see *id.* at 36a-37a.

The court of appeals next determined that the district court did not abuse its discretion when it rejected petitioner's argument that the 45-day consultation period should be extended under the equitable tolling doctrine. Pet. App. 9a-10a. The court of appeals observed that petitioner did not allege that he was unaware of the procedural prerequisites for filing a Title VII action, or that the Army misled him about his right to file such an action. *Id.* at 10a. To the contrary, the court noted, petitioner demonstrated as early as October 1998, when he filed his discrimination claim under Michigan law in federal court, that he was aware of the critical facts underlying his Title VII claim. "At that point," the court noted, petitioner "chose to file a

lawsuit rather than contact his EEO officer" to pursue a Title VII claim. *Ibid.*

ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is not warranted.

1. a. Petitioner first asserts (Pet. 8-15) that the court of appeals' decision conflicts with *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101 (2002), and other decisions of this Court, insofar as it affirmed the district court's determination that petitioner suffered no discrete discriminatory acts within the 45-day period immediately before he contacted an Equal Employment Opportunity counselor. The issue raised by petitioner is entirely fact-bound, and the district court, affirmed by the court of appeals, correctly resolved it.

Morgan involved the private-employer provisions of Title VII, rather than the federal-employer provisions of 42 U.S.C. 2000e-16 and 29 C.F.R. 1614.105 that are at issue in this case. The Court held in *Morgan* that when there is a series of discrete but related Title VII violations, the plaintiff may recover only for those discriminatory acts that occurred within the applicable limitations period. 536 U.S. at 110-115. "Each discrete discriminatory act starts a new clock for filing charges alleging that act." *Id.* at 113. For his suit to be timely under the rule applied in *Morgan*, petitioner must identify at least one discrete discriminatory act that occurred within 45 days before his EEO contact on June 3, 1999.

Petitioner claims that he was subjected to discriminatory acts within the 45-day period, involving his "job assignments and work responsibilities." Pet. App. 7a;

see Pet. 9-11. But the court of appeals upheld the district court's "factual determination that the current conditions of [petitioner's] employment are a consequence of the fact that"—many months before he contacted an EEO counselor—"he was accused * * * of espionage and had his security clearance revoked." Pet. App. 7a; see *id.* at 37a-38a.[2]

Petitioner does not argue that he can recover under Title VII for the lingering effects of alleged discrimination that occurred before April 19, 1999. Nor does he identify any decision of this Court, or any other court, that has allowed a Title VII claim to proceed on facts similar to the facts found by the lower courts in this case.[3] See Pet. 13-14. Rather, petitioner argues that the district court's factual determination about the origins of his alleged conditions of employment after March 1998 was "contrary to the evidence" and not suitable for resolution by summary judgment. Pet. 15.

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[2] The court of appeals separately addressed petitioner's claims relating to the suspension and revocation of his security clearance. See Pet. App. 3a-5a. Those issues are discussed below. See pp. 11-13, *infra*.

[3] In *Morgan*, the Court did not define a "discrete discriminatory act." The Court stated, however, that "[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify." 536 U.S. at 113-114. Petitioner's claims relate to ongoing conditions of employment, not discrete acts of that sort. Compare *Bazemore* v. *Friday*, 478 U.S. 385, 395-396 (1986) ("Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII."), with *Delaware State Coll.* v. *Ricks*, 449 U.S. 250, 257, 259-260 (1980) (finding suit time-barred where plaintiff failed to identify discriminatory acts that continued into the limitations period), and *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 558 (1977) (same).

That evidentiary claim presents no issue suitable for further review.

b. Petitioner further asserts that his Title VII claims are not time-barred because he "pled facts alleging a pattern-or-practice of discrimination and/or hostile work environment" that continued after April 19, 1999. Pet. 17. Petitioner again relies on *Morgan*, in which the Court further held that, when an unlawful hostile work environment begins before the limitations period and continues into the period, the employer's Title VII liability is not limited to liability for the particular acts that occurred within the limitations period. Pet. 15-16; see *Morgan*, 536 U.S. at 115-121.

Petitioner's argument involves no *legal* disagreement with the court of appeals. Rather, petitioner contends that the court of appeals should not have affirmed the district court's *factual* determination that petitioner did not allege or produce evidence that the Army has an official policy of discriminating against American Jews. Pet. App. 9a; see *id.* at 36a-37a. Here again, the court of appeals' reasonable factual determination, in its unpublished opinion, presents no issue suitable for review by this Court.[4]

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[4] *Morgan* specifically did not address pattern-or-practice claims under Title VII. See 536 U.S. at 115 n.9. Nevertheless, petitioner argues that "the legal standards" governing pattern-or-practice cases "are virtually identical to the legal standards in adjudicating hostile work environment claims" and, therefore, the reasoning of *Morgan* should apply to pattern-or-practice claims. Pet. 16. Petitioner's argument for extending *Morgan* need not be considered in this case because, even if *Morgan* does apply to pattern-or-practice claims as petitioner suggests, petitioner failed to establish a pattern or practice of discrimination. See Pet. App. 9a. Furthermore, petitioner's claims are time-barred under *Morgan* if they are viewed as hostile-environment claims, because, as discussed above, see pp. 7-8, *supra*, no "act contributing to the claim

2. Petitioner next asserts (Pet. 20-22) that the 45-day consultation deadline should have been tolled in his case under *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), because his first lawsuit was incorrectly filed under Michigan law rather than Title VII, and the Army allegedly concealed its discriminatory conduct. Pet. 20-22.

Equitable tolling and equitable estoppel principles apply to Title VII claims. See *Morgan*, 536 U.S. at 113. As petitioner states, equitable doctrines have been used to extend limitations periods when a plaintiff "actively pursued his judicial remedies" but mistakenly filed "a defective pleading during the statutory period," or was "induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin*, 498 U.S. at 96. However, equitable extensions generally are not appropriate "where the claimant failed to exercise due diligence in preserving his legal rights." *Ibid.*

This case does not involve a timely court filing that, although defective, was consistent with the exercise of "due diligence" in the prosecution of petitioner's Title VII claims. See *Irwin*, 498 U.S. at 96. Although petitioner's filing of state-law discrimination claims in October 1998 indicated his awareness of the basis for his later Title VII claims, that state-law filing did not in any way substitute for, or prevent petitioner from pursuing, the administrative EEO process that was a prerequisite to bringing a Title VII claim against the Army. Nor does it matter whether petitioner's first counsel provided deficient representation in pursuing the initial discrimination case under Michigan law. See

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occur[ed] within the [45-day limitations] period." *Morgan*, 536 U.S. at 117; see Pet. App. 7a ("[Petitioner] has not established that a discriminatory act occurred in the limitations period.").

Pet. 20. If petitioner's counsel was deficient in presenting petitioner's civil claims, then petitioner's remedy is a suit for malpractice, *Link* v. *Wabash R.R.*, 370 U.S. 626, 634 n.10 (1962)—not an exemption from the mandatory EEO consultation requirement.[5]

Petitioner further contends (Pet. 22) that the district court should have equitably extended the consultation deadline because the Army concealed certain facts that petitioner would have needed in order to pursue earlier a Title VII religious-discrimination claim. The court of appeals correctly rejected that argument as well. See Pet. App. 10a. The court of appeals explained that petitioner did not "need [to] know all the facts of his case in order to comply with Title VII's administrative exhaustion requirement." *Ibid.* It determined that petitioner's filing of a discrimination complaint in the district court in October 1998 showed that, at that time, petitioner already "knew enough critical facts" to allow him to pursue federal remedies. *Ibid.* Petitioner casts no serious doubt on the correctness of the court of appeals' resolution of that issue, see Pet. 22, and the issue does not involve any question warranting this Court's review.

3. Finally, petitioner disputes the court of appeals' determination (Pet. App. 3a-5a) that federal agencies' security-clearance determinations are not reviewable in Title VII actions. See Pet. 23-29. In dismissing petitioner's security-clearance claims, the court of appeals correctly applied *Department of the Navy* v. *Egan*, 484 U.S. 518 (1988). In *Egan*, the Court concluded that

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[5] Contrary to petitioner's argument (Pet. 21), the filing of a claim under the Federal Tort Claims Act in October 1998 was not a substitute for satisfaction of the clearly established EEO consultation requirement. See 29 C.F.R. 1614.105(a)).

security-clearance determinations are committed to the discretion of Executive agencies, and the Merit Systems Protection Board could not review the substance of an agency's clearance decision. *Id.* at 525-534. Likewise, in this case, the district court correctly declined to review the Army's decision to suspend and ultimately revoke petitioner's security clearance. See Pet. App. 39a-41a. As petitioner acknowledges (Pet. 23-24 n.3), all the other courts of appeals that have addressed the issue have reached the same conclusion, namely, that security-clearance decisions are not judicially reviewable in Title VII cases. See Pet. App. 3a-4a (citing cases).

Petitioner argues that constitutional challenges to the Army's security-clearance decisions in this case would be justiciable. Pet. 24-27. *Webster* v. *Doe*, 486 U.S. 592 (1988), on which petitioner primarily relies (Pet. 24), did not so hold. *Webster* involved the CIA's termination of an employee pursuant to a statute that gave the CIA Director discretion to remove employees in the interests of national security. The Court determined that the employee-removal statute did not clearly express a congressional intent to bar judicial consideration of constitutional claims arising from an allegedly discriminatory termination by the Director. See 486 U.S. at 596, 601-605. Here, by contrast, Congress has established Title VII as petitioner's "exclusive judicial remedy for [his] claims of discrimination in federal employment." *Brown* v. *GSA*, 425 U.S. 820, 835 (1970). Furthermore, the court of appeals gave a complete answer to petitioner's contention that constitutional claims would be maintainable: petitioner's "complaint does not contain any constitutional claims." Pet. App. 4a. Petitioner's attempt to re-package his Title VII claims as constitutional claims for purposes of

the instant petition, see Pet. 29-30 n.5, does not change that dispositive fact.

Similarly, because petitioner "presented no specific cause of action to the district court regarding the violation of any regulations" governing security-clearance decisions, that issue was not before the court of appeals and the court of appeals did not address it on the merits. Pet. App. 4a. Although petitioner raises the issue in this Court, see Pet. 25-26, 28 (suggesting violation of Executive Orders and agency regulations), it is not ripe for the Court's review. See *Glover* v. *United States*, 531 U.S. 198, 205 (2001) (Court ordinarily does not decide issues that were not raised or resolved below).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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MAY 2003